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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 773. ~~155~~ 180

THE WOODSTOCK IRON COMPANY, PLAINTIFF IN ERROR,

vs.

THE RICHMOND AND DANVILLE EXTENSION COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

FILED OCTOBER 24, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 & 2 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Northern District of Alabama. Oct. Term, 1884.

The plaintiff, which is a corporation created by and under the laws of the State of New Jersey, claims of the defendant, a corporation created by and under the laws of the State of Alabama, and located and having its principal place of business in the county of Calhoun, in the State of Alabama, claims of the defendant thirty thousand dollars for the breach of an agreement entered into by it on, to wit, the 18th day of November, 1881, whereby and wherein said defendant agreed and promised that if said plaintiff would locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific Railroad Company (or of the then new consolidated company then being formed and to be known as the Georgia Pacific Railroad Company) by way of the town of Anniston, it, the said defendant, would donate and pay to the said plaintiff, or as it might direct, the cash sum of thirty thousand dollars, to be paid in money as to one-half—that is, fifteen thousand dollars—when the said Georgia Pacific Railroad Company connected its line with the line of the Alabama Great Southern Railroad Company at or above Birmingham, Alabama, and the other half—that is, fifteen thousand dollars—when said line was connected with the line of the Louisville & Nashville Railroad Company (the North & South Alabama Railroad Company) at or above said city of
3 Birmingham, provided said connections be made within three years from date of said contract. And plaintiff avers that it did cause to be located and constructed the railroad of the said Georgia Pacific Railway Company by way of the town of Anniston; that the said Georgia Pacific Railroad Company connected its line with the line of the Alabama Great Southern Railroad Company at or above said Birmingham on, to wit, the 1st day of June, 1883, and with the line of the Louisville & Nashville Railroad Company at or above said city on, to wit, the 1st day of July, 1883; yet, although the said plaintiff has complied with all the provisions of said contract on its part, the said defendant has failed to comply with the following provisions thereof, viz: It has failed and refused and still fails and refuses to pay, though often requested so to do, any part of said sum of thirty thousand dollars, except the sum of six thousand three hundred & twenty-five dollars, whereby it has become and is indebted to said plaintiff as aforesaid; wherefore this suit.

The said plaintiff claims of the said defendant the further sum of thirty thousand dollars for the breach of an agreement entered into by him on, to wit, the 18th day of November, 1881, in words and figures in substance as follows:

ANNISTON, CALHOUN CO., ALABAMA,
November 18*th*, 1881.

The Woodstock Iron Company makes to the Richmond and Danville Extension Company the proposition following—that is to say:

First. If the Richmond and Danville Extension Company will locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific Railroad Company (or of the new consolidated company now being formed, to be known as the Georgia Pacific Railway Company) by way of the town of Anniston, the Woodstock Iron Company will donate and convey, or cause to be donated and conveyed, by goods and sufficient deeds, to the Richmond and Danville Extension Company, or as it may direct: 1. Strips or parcels of land each one hundred feet wide—that is to say, fifty feet on each side of the center line of the location to be fixed for said railroad in, over, and through all and sundry the tracts and lots of land now owned and to be owned by the Woodstock Iron Company, wheresoever situated, on and along the line of said location outside of corporate limits of the town of Anniston, and the Woodstock Iron Company will, upon request of said extension company, at any time, proceed to clear the said strips or parcels of land from timber thereon, allowing, however, the said extension company to have and take therefrom all that part of timber useful to it for the purpose of construction and for cross-ties.

2. A strip or parcel of land in, over, and through the entire corporate limits of the town of Anniston, so far as owned by the Woodstock Iron Company, as follows—that is to say, on the left or west side of the center line of the location to be fixed for said railroad, from the point of entering to the point of leaving said corporate limit, a width of fifty feet, measuring from said center line, and on the right or east side of the center line of the location to be fixed for said railroad a width of fifty feet, measuring from said center line from the point of entering said corporate limits to a point nineteen hundred and six and eight-tenths feet short of a point agreed, at or about the near foot of a hillock situated in a field in a westerly direction from the depot of the Selma, Rome and Dalton road; thence for a length of thirteen hundred six and eight-tenths feet to said point agreed a width of one hundred and fifty feet, measuring from said center line, and thence to a point of leaving said corporate limits a width of fifty feet, measuring from said center line. Appended hereto is a tracing showing said strip or parcel of land.

3. All such additional strips or parcels of land within and adjoining the town of Anniston as the experimental location about to be made may show to be reasonably necessary for sidings and other tracks for the advantage-s and convenient transaction of the business of the Georgia Pacific Railroad or Railway Company, and especially for siding or spare track along and to the right or east of the Selma, Rome and Dalton line, for convenient approach to the furnaces and for sidings or spare tracks from the main line, at or above the place of greatest width, for convenient approach to the cotton factory and to the presently-to-be-established car-wheel and car works.

The Woodstock Iron Company will aid the work of construction, and especially so of the sidings or spare tracks for the furnace, by the judicious wasting of the furnace cinder and other mate-
6 rial; and the said company will in a general way do all it can to facilitate the work and advance the business of the railroad company whose location it invites; and the Woodstock Iron Company will donate and pay to the Richmond and Danville Extension Company, or as it may direct, the cash sum of thirty thousand dollars, paying the same in money as to one-half—that is, fifteen thousand dollars—when the Georgia Pacific Railroad or Railway Company connects its line with the line of the Alabama Great Southern Railroad Company at or above Birmingham, Alabama; and as to the other half—that is to say, fifteen thousand dollars—when the Georgia Pacific Railroad or Railway Company connects its line with the line of [the] Louisville & Nashville Railroad Company (the North & South Alabama Railroad Company) at or above Birmingham, Alabama, the above to be paid only provided the Georgia Pacific Railroad or Railway Company is so far completed as to make the connections above within three years from this date.

In case the Richmond and Danville Extension Company accepts the terms proposed above, this instrument shall have the effect of a binding contract upon the Woodstock Iron Company; but such acceptance must be in writing and addressed to the president and secretary and treasurer of the Woodstock Iron Company at Anniston, Alabama, within four months from the date thereof, and, if the Richmond and Danville Extension Company shall desire hereafter to build machine shops for the Georgia Pacific Railroad or Rail-
7 way Company at the town of Anniston, will donate and convey to said extension company, or as it may direct, by good and sufficient deeds for that purpose, at least five acres of land at a convenient distance from the crossing of the Selma, Rome and Dalton road. If, however, this land is accepted for shops, the land *land* shall be appropriated and the shops built within four years from this date.

In testimony whereof witness the signature of the president and secretary and treasurer, and the corporate seal of the Woodstock Iron Company, this 18th day of November, 1881.

[SEAL.] ALFRED L. TYLER, *Pres'd't.*
SAMUEL NOBLE,
Sec't'r. & Treas.

And the plaintiff avers that it did accept the terms proposed by said instrument above set out in a writing, addressed to the president and secretary & treasurer of said Woodstock Iron Company, at Anniston, within four months from the date of said agreement and instrument, which said writi-g was delivered to said president & secretary & treasurer on, to wit, the 18th day of January, 1882, and is in words & figures in substance as follows:

"ATLANTA, GEO., *Jan'y 17th*, 1882.

"Messrs. Alfred L. Tyler, president, and Samuel Noble, secretary and treasurer of Woodstock Iron Company, Anniston, Ala.

GENTLEMEN: The Richmond and Danville Extension Company hereby notifies you that it accepts the proposition in writing
8 made by you on behalf of the Woodstock Iron Company to said extension company regarding the location and construction of the Georgia Pacific railway by the town of Anniston, the date whereof is Anniston, Calhoun Co., Alabama, November 18th, 1881, and a copy of which is hereto appended.

Respectfully, JOHN U. JOHNSTON,
Vice-President Richmond & Danville Extension Company.

And plaintiff avers that said defendant was at that time engaged, among other things, in the business of making pig-metal and other products from iron ores, and making sales of the same; that its works were located in said town of Anniston, & that it owned large quantities of valuable property therein, & that the said railroad referred to in said contract was a road, then in the process of construction, to be run from Atlanta, Geo., through the State of Alabama to Columbus, in the State of Mississippi; and plaintiff avers that it did locate and construct the railroad of the said Georgia Pacific Railway Company by way of the town of Anniston, by, to wit, the 1st day of January, 1883; that it did connect the line of said railway company with the line of the Alabama Great Southern Railroad Company, at or above said city of Birmingham, by, to wit, the 1st day of June, 1883, and that it did connect the line of said railway company with the line of the Louisville & Nashville Railroad Company, at or above the said city of Birmingham, by, to wit, the 1st day of July, 1883, and has in all things fully complied with all the terms and stipulations of
9 said agreement to this extent, but no further: It has donated and conveyed by goods and sufficient deeds to the Georgia Pacific Railway Company, as directed and requested by the plaintiff, of the several strips and parcels of land for right of way and sidings of the railroad of said company, as stipulated and agreed in said agreement, and has paid to the said plaintiff on account of said cash payment of thirty thousand dollars agreed and undertaken to be made by said agreement the sum of six thousand three hundred & twenty-five dollars, paid in cars furnished and advanced by defendant to the Georgia Pacific Railroad Company, on account of said cash payment, at the request of plaintiff. But plaintiff further avers that although it has fully complied with all the terms and stipulations of said agreement to be done and performed on its part, that although it located and constructed said railroad of the Georgia Pacific Railway Company by the way of the town of Anniston and connected the line of said railroad with the respective lines of the Alabama Great Southern Railroad Company and the Louisville & Nashville Railroad Company within the time and at the points agreed on, as is hereinabove fully set out and shown, the defendant has wholly failed and refused, and still fails and refuses, although often requested

to do so, to pay to said plaintiff said sum of twenty-three thousand six hundred and seventy-five dollars, the balance due and unpaid upon said cash sum of thirty thousand dollars donated, and
10 agreed to be paid to plaintiff by said defendant upon the making of said connections as aforesaid, and by reason of the several matters and things set out and alleged herein the said defendant became and is indebted to the plaintiff in said sum of twenty-three thousand six hundred and seventy-five dollars, with interest thereon from date of the making of such connections, but has failed and refused, and still fails and refuses, to pay the same; wherefore this suit.

TROY & TOMPKINS,
Att'ys for Pl'ff.

The plaintiff being a non-resident of the State of Alabama, I acknowledge myself for costs of this suit.

JOHN U. JOHNSTON.

Endorsed: Filed in the clerk's office this 23rd day of June, A. D. 1884. A. W. McCullough, clerk.

11 UNITED STATES OF AMERICA:

Circuit Court of the United States for the Northern District of Alabama, Northern Division.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby commanded to summon the Woodstock Iron Company, a corporation incorporated and organized under the laws of the State [of] Alabama, who is [a] citizen of the State of Alabama, to appear before the hon. circuit court aforesaid, at the place of holding said court at Huntsville, on the second Monday of October next, to answer the complaint of the Richmond and Danville Extension Company, a corporation incorporated and organized under the laws of the State of New Jersey, who is a citizen of the State of New Jersey; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first Monday of April, in the year of our Lord one thousand eight hundred and eighty-four.

Issued the 23rd day of June, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal Circuit Court U. S., N. D. of Alabama.]

Attest: A. W. McCULLOUGH,
Clerk U. S. Circuit Court, Northern District of Ala.

12 [Endorsed:] No. 1320, No. 10. Circuit court of the United States, northern district of Alabama, northern division. Summons and complaint. The Richmond & Danville Extension Company *vs.* The Woodstock Iron Company. Issued this 23rd day of June, 1884. A. W. McCullough, clerk. Returned and filed this 30th day of

June, A. D. 1884. A. W. McCullough, clerk. Troy & Tompkins, plaintiff's attorney-.

Received in office this 24 day of June, 1884.

J. M. HINDS,
U. S. Marshal.

Executed by serving a copy of the within summons and complaint on Alfred L. Tyler, president W. I. Co., by leaving a copy at his office in Anniston, Ala., and with Samuel Noble, sec'y of the *of the* W. I. Co., this the 25th day of June, 1884.

J. M. HINDS,
U. S. Marshal,
By H. B. SCOTT,
Deputy.

Serving 1 copy	$2 00
Mileage, 176 miles	10 56
	$12 56

13 *Pleas.*

In the Circuit Court for the Northern District of Alabama, sitting at Huntsville, Alabama.

THE RICHMOND & DANVILLE EXTENSION COMPANY

vs.

THE WOODSTOCK IRON COMPANY, a Body Corporate under the Laws of Alabama.

Plea No. 1. And now comes the defendant in the above-entitled cause, and for answer to the complainant says that it is not true, as therein stated, that said plaintiff is a corporation created by and under the laws of the State of New Jersey; and the defendant in fact says that said plaintiff in not a corporation organized under the laws of the State of New Jersey, nor is said plaintiff a corporation organized under the laws of any State, or by any power or authority whatsoever competent to invest plaintiff with corporate capacity, or with corporate rights or privileges.

Plea No. 2. And the said defendant, for further answer to said complainant, says that it did not promise and undertake in the manner and form alleged in said complaint.

Plea No. 3. And said defendant, for further answer to said complainant, says that the statements of said complainant are not true as therein stated, and defendant in fact says that at the time it is alleged said agreement was made by Alfred L. Tyler, purporting to act as president, and Samuel Noble as secretary, of said Woodstock Iron Company, defendant was and is a private corporation, organized and incorporated under the provisions of chapter 3, title
14 2, part 2, of the Code of 1867 of the State of Alabama, wherein and by which it is provided that when two or more persons are desirous of engaging in any manufacturing, mining, or quarry-

ing business and of becoming incorporated such persons must make a declaration in writing, stating the name of the company and the object for which is is formed, the amount of capital stock, and the number of shares into which the same is divided, the names of the stockholders, and the number of shares held by each. This declaration, signed by the stockholders and acknowle-ged before any officer authorized to take acknowledgement of deeds, must be recorded in the office of the judge of probate of the county or counties in which such business is to be carried on, and upon the filing and recording of such declaration the persons who have signed and acknowledged the same, and their successors, becomes a body incorporated by the — stated therein, and with the power conferred on private corporations, under and by the provisions of said code.

That under the provisions of said code of Alabama, aforesaid, Daniel Tyler, Alfred L. Tyler, Edmund L. Tyler, Samuel Noble, trustee; James Noble, sec't'y; John W. Noble, and William Noble, signed and acknowledged before Charles H. Smith, a notary public and commissioner of deeds in Georgia for Alabama, an officer authorized to take such acknowledgments, the following declaration, which was duly recorded in the probate court of Calhoun county Alabama.

GEORGIA, *Floyd County*:

Know all men by these presents that Daniel Tyler, Alfred L. Tyler, Edmund L. Tyler, Samuel Noble, trustee; James Noble, secr.; Samuel Noble, James W. Noble, and William Noble, being desirous of engaging in the business of manufacturing iron from iron-ore, in the county of Calhoun, State of Alabama, and of being incorporated as a company for that purpose, under the laws of the State of Alabama, do make this declaration in writing—

1st. The name of said company shall be The Woodstock Iron Company, and its object the manufacturing of pig-metal and other products of iron ore and making sale thereof, connecting with said business all such operations as are usual and incidental thereto.

2nd. The capital stock of said company is now seventy-five thousand dollars, but an increase thereof is contemplated until it shall aggregate the sum of two hundred thousand dollars. Said capital stock is divided into 750 shares of 100 dollars each.

3rd. The names of stockholders and the number of shares held by each is as follows:

Daniel Tyler, 200 shares; Alfred L. Tyler, 100 shares; Edmund L. Tyler, 75 shares; Samuel Noble, trustee, 100 shares; Samuel Noble, 69 shares; James Noble, secr., 69 shares; John W. Noble, 69 shares; Wm. Noble, 68 shares; their works to be located near the town of Oxford, Calhoun, Co., State of Alabama.

STATE OF GEORGIA, *County of Floyd, City of Rome:*

I, Chas. H. Smith, a notary public and a commissioner of deeds in Georgia, for the State of Alabama, do hereby certify that Daniel Noble, trustee; James Noble, secr., John W. Noble, and William

Tyler, Alfred L. Tyler, Edmund L. Tyler, Samuel Noble, Samuel Noble, whose names are signed to the foregoing declaration, and who, are known to me, acknowledged before me this day that, being informed of the contents and purposes of the declaration, they executed the same voluntarily, on the day the same bears date.

16 Given under my hand this 29th day of April, A. D. 1872.

CHARLES W. SMITH,
Notary Public and Commissioner of Deeds in Georgia for Alabama.

Filed in office and recorded May 4th, 1872.

A. WOODS,
Judge of Probate.

Defendant says, that under its charter and laws of Alabama, it has the following *persons*, namely: To manufacture pig-metal and other products of iron ore, and making sale thereof, connecting with said business all such operations as are usual and incidental thereto; to have succession by its corporate name perpetually; to sue and be sued; to use a common seal and to alter the same at pleasure; to hold, purchase, dispose of, and convey such real and personal estate to such an amount as the business of the corporation requires; to appoint such subordinate officers and agents as the business of the corporation requires; prescribe their duties and fix their compensation; to make by-laws, not inconsistant with any existing law, for the transfer of its stock, the management of its property, or the regulation of its affairs, and by its charter, and the provisions of said cod- of Alabama, under which its was incorporated, as aforesaid, defendant is inhibited from possessing or exercising any corporate power in addition to those enumerated, except such as are necessary to the exercise of the said power enumerated herein.

And defendant says that it had no power or authority under its charter and the laws of said State of Alabama to make said

17 alleged agreement mentioned in said complaint to donate and pay to said plaintiff the sum of thirty thousand dollars if said plaintiff would locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific Railroad Company (or of their new consolidated company then being formed, to be known as the Georgia Pacific Railroad Company) by way of the town of Anniston; nor did the president and secretary and treasurer of said Woodstock Iron Company have any such power or authority to make such alleged agreements for and on behalf of said company, and said alleged agreement is void and not obligatory on defendant.

Plea No. 4. And the said defendant, for further answer to said complainant, says that it did not promise and undertake in the manner and form alleged in said complaint; and said defendant in fact says that at the time said alleged agreement was made with plaintiff by Alfred L. Tyler, purporting to act as president, and said Samuel Noble, purporting to act as secretary and treasurer of said defendant's company, defendant was without power or authority,

under its charter, to make said contract, and said Alfred L. Tyler and Samuel Noble were not authorized by defendant to make said contract or agreement with plaintiff as agents of defendant; and said alleged contract or agreement is not obligatory upon defendant.

Plea No. 5. And the said defendant, for further answer to said complaint, says that said alleged agreement, mentioned in said complaint, is without any consideration as to defendant, and is
18 void and not binding on defendant..

HALFIN, BOWDAN & KNOX,
Att'ys for Defendant.

Endorsed: Filed in clerk's office this 9th day of October, A. D. 1884.

A. W. McCOLLOUGH, *Clerk.*

19 THE UNITED STATES OF AMERICA,
Northern District of Alabama:

Be it remembered that heretofore, to wit, on the 28th day of October, A. D. 1884, it being a day of a regular term of the circuit court of the United States for the northern district of Alabama, begun and held at the United States court-rooms in the city of Huntsville, in said district, on the 2nd Monday of October, A. D. 1884, and of the Independence of the United States of America the one hundred and 9th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

Continuance.

THE RICHMOND & DANVILLE EXTENSION CO.
vs.
WOODSTOCK IRON CO. } 1320.

Come the parties by their attorneys and on motion of defendant's counsel, and for good cause shown, it is ordered by the court that this cause be continued.

20 THE UNITED STATES OF AMERICA,
Northern District of Alabama:

Be it remembered that heretofore, to wit, on the 31st day of October, A. D. 1884, it being a day of a regular term of the circuit court of the United States for the northern district of Alabama, begun and held at the United States court-rooms in the city of Huntsville, in said district, on the 2nd Monday of October, A. D. 1884, and of the Independence of the United States of America the one hundred and 9th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

Transferred.

THE RICHMOND AND DANVILLE EXTENSION CO. } 1320.
vs.
THE WOODSTOCK IRON CO.

Come the parties by their attorneys, and, on motion and by agreement of counsel, it is ordered by the court that this cause be transferred to the circuit court of the United States at Birmingham, Alabama, when the said court shall have been organized.

21 *Agreement.*

In Circuit Court of the United States for the Northern District of Alabama, at Huntsville, Ala.

RICHMOND AND DANVILLE EXTENSION COMPANY
vs.
WOODSTOCK IRON CO.

It is agreed between the counsel of the several parties to the above-stated cause that it shall be removed from said circuit court at Huntsville to the same court to be holden at Birmingham, Alabama, and placed upon the docket of said last-mentioned court, and to stand for trial at the first term thereof; and, for the purpose of carrying this agreement into effect, the clerk of said court at Huntsville is hereby requested to transfer all the original papers in said cause on file in his office to the office of the clerk of said court, at Birmingham, Ala.

This the 2nd day of February, 1885.

TROY & TOMPKINS,
Att'ys for Plaintiff.
HEFLIN, BOWDON & KNOX,
Att'ys for Defendant.

(Endorsed:) 1320. Richmond and Danville Extension Company *vs.* Woodstock Iron Company. Agreement of counsel. Final Record Book I, page 480. Filed in clerk's office this 16th day of February, A. D. 1885. A. W. McCullough, clerk.

22 THE UNITED STATES OF AMERICA,
Northern District of Alabama:

Be it remembered that heretofore, to wit, on the 3rd day of March, A. D. 1885, it being a day of a regular term of the circuit court of the United States for the southern division of [the] northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said district, on the 1st Monday of March, A. D. 1885, and of the Independence of the United States of America the one hundred and 9 year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

THE RICHMOND AND DANVILLE EXTENSION CO.

vs.

WOODSTOCK IRON CO.

Come the parties, by their attorneys, and, on motion of plaintiff's counsel, it is ordered by the court that the plaintiffs have leave to amend their complaint filed herein.

23 *Demurrer.*

In the Circuit Court for the Northern District of Alabama, U. S.

THE RICHMOND & DANVILLE EXTENSION COMPANY

vs.

THE WOODSTOCK IRON CO.

And now comes the defendant in the above-entitled cause and demurs to the complaint in said cause, and to each count thereof separately, and assigns the following grounds of demurrer thereto, namely:

1st. Defendant demurs to the complaint upon the following grounds, namely:

1st. The facts stated in the complaint show no cause of action against defendant.

2nd. The contract set up in the complaint as the foundation of the suit is without consideration as against defendant and cannot be enforced.

3rd. The contract upon which the suit is based and for the breach of which the action is brought is contrary to public policy and void.

4th. The alledged agreement of defendant to donate and pay
24 plaintiff thirty thousand dollars, among other things, if said plaintiff would locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific Railroad Company by way of the town of Anniston is contrary to public policy and is void.

2. The defendants demur separately to the first count of the complaint and assign the same grounds of demurrer that are assigned to the complaint, numbered from one to four, inclusive, respectively.

3. The defendant demurs separately to the second count of the complaint and assigns the same grounds of demurrer that are assigned to the complaint, numbered from one to four, inclusive, respectively.

HEFLIN, BOWDON & KNOX,
Att'ys for Defendant.

(Endorsement:) No. 10. The Richmond and Danville Extension Company *vs.* The Woodstock Iron Company. Demurrer of plaintiff. Filed in clerk's office at Birmingham, this March 5th, 1885. A. W. McCullough, clerk cir. ct.

25 In Circuit Court of the United States, at Birmingham, Ala.

THE RICHardson & DANEVILLE EXTENSION CO.

vs.

THE WOODSTOCK IRON CO.

Now comes the plaintiff in the above-stated cause and demurs to the pleas filed by the defendant therein, and numbered, respectively, first, third, fourth, and fifth, and, for causes of demurrer, assigns separately to each of said pleas the following grounds:

First. That the defendant has not by said pleas traversed or denied or attempted to put in issue any matter of *effect* alledged by the plaintiff, but has introduced and attempted to put in issue matters of fact not alledged nor necessary to be alledged, and that pleas are no answer to the complaint filed in this cause, but are evasive and argumentative.

Second. That the facts alledged in said pleas are not sufficient in law, either as a traverse or in confession or avoidance of plaintiff's cause of action set out in the complaint filed in this cause.

26 And to said plea number one the plaintiff assigns the following grounds of demurrer:

First. That said defendant, having contracted with plaintiff as a corporation, is estopped from denying its corporate existance.

Second. That the defendant has not by its said plea traversed or denied, or attempted to put in issue, the allegations of said complaint charging and alledging that it contracted with said plaintiff in its corporate capacity, and is estopped from denying the same.

And to said plea number three said plaintiff assigns the following additional grounds of demurrer:

First. That the facts set up in said plea show that it was within the scope of defendant's powers as a corporation to enter into the contract sued upon in this cause.

Second. That the facts set up in said plea show that the defendant, at the time of making the contract or agreement sued

27 on in this action, was a corporation organized under the laws of this State for the purpose of manufacturing pig-metal and other products of iron ore, and making sale thereof, and with the power and authority to make all such contracts and agreements as are designed and may be useful to promote the object for which such corporation was formed; and it is not denied that the contract sued was such an agreement.

Third. That the defendant has not by said plea traversed or denied, or attempted to put in issue, that the building of said railroad by the town of Anniston, in consideration of which said defendant undertook and agreed as is set out in said complaint, was a means reasonably promotive of the main purpose for which said corporation was organized, namely, the manufacture of pig-iron and other products of iron ore, and making sale thereof.

Fourth. That under the allegations and averments contained in the complaint filed in this cause and not denied by defend-

28 ant in said plea defendant is estopped from sitting up the defence that said contract and agreement is *ultra vires*.

Fifth. That the defendant has not by said plea traversed or denied, or attempted to put in issue, that the contract or agreement set out in the complaint in this cause, and which is the foundation of this suit, had been fully executed and performed by this plaintiff on its part before the commencement of this suit.

Sixth. That it is filed in the complaint filed in this cause, and is not denied or put in issue in said plea, that this plaintiff had fully performed and executed each and all the things undertaken and agreed to be performed by it by and in the contract or agreement set out in said complaint and which is the foundation of this suit. And defendant is estopped from setting up the defence to this action that it was not within the scope of its, the defendant's,
29 power to enter into such contract or agreement in writing, and said plea denies its execution and is not sworn or in any way verified by an affidavit.

Second. That said plea undertakes to deny or put in issue the execution of a written instrument, the foundation of this suit, and is not verified by affidavit.

Third. That said plea undertakes to deny or put in issue the execution of a written instrument, the foundation of this suit, purporting to be executed by the defendant through its officers and agents, and is not verified by an affidavit.

Fourth. That said plea undertakes to deny the power and authority of its officers to execute the written contract or agreement, which is the foundation of this suit, and is not verified by an affidavit.

Fifth. That the statements contained in said plea are vague and uncertain, and—

30 Seventh. That it appears from the complaint filed in this cause that said plaintiff had fully performed and executed each and all the matters and things agreed upon or undertaken to be performed and executed by it in said agreement set out in said complaint, and that said defendant had received the benefit of such performance on the part of said plaintiff, and said plea does not traverse or deny or in any manner put in issue such allegations and averments of said complaint.

And to said plea number four said plaintiff assigns separately each and all the foregoing and above grounds of demurrer, and in addition thereto the following:

First. The contract or agreement set out in the complaint, and which is the foundation of this suit, *is* alle*d*ged therein to be,
31 are statements and conclusions of law.

And to said plea number five said plaintiff assigns the following additional grounds of demurrer:

First *first*. That the defendant has not by said plea traversed or denied or attempted to put in issue any matters of fact alle*d*ged by the plaintiff.

Second. That said plea is vague and uncertain and does not alle*d*ge any facts in bar of this action, but statements and conclusions of law.

Wherefore said plaintiff prays judgment of said several pleas

aforesaid, and whether it shall be further required to answer the same.

TROY & TOMPKINS,
Attorneys for Plaintiff.

(Endorsement:) No. 10. The Richmond & Danville Extension Co. *vs.* The Woodstock Iron Co. Demurrer of plaintiff to pleas. Filed in clerk's office, at Birmingham, this February 26, 1885. A. W. McCullough, clerk cir. c't.

32 THE UNITED STATES OF AMERICA,
Northern District of Alabama:

Be it remembered that heretofore, to wit, on the 6th day of March, A. D. 1885, it being a day of a regular term of the circuit court of the United States for [the] southern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Birmingham, in said district, on the 1st Monday of March, A. D. 1885, and of the Independence of the United States of America the one hundred and 9th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

RICHMOND AND DANVILLE EXTENSION COMPANY
vs. } 10.
WOODSTOCK IRON CO.

This day comes the parties, by their attorneys, and defendant demurred to the complaint filed in this cause by plaintiff; and such demurrer being duly considered and understood by the court, it is ordered and adjudged that the same be, and are hereby, overruled.

Thereupon said defendant filed its five several pleas; and to said pleas numbered one, three, four, and five the said plaintiffs demurs; and the defendant confesses the demurrers to said plea numbered four and joins in the several demurrers to said pleas numbered one, three, and five; and the same being duly considered and understood by the court, it is ordered and adjudged that the demurrers to said plea numbered one be, and the same are hereby, overruled, and that the demurrers to said other pleas be, and the same are hereby, sustained; and the said defendant asks leave to file additional pleas, which is granted.

33 THE RICHMOND AND DANVILLE EXTENSION COMPANY
vs.
THE WOODSTOCK IRON COMPANY.

By leave of the court first had and obtained defendant files the following additional pleas in the above-entitled cause, namely:

Plea No. 6. The defendant, for further answer to the complaint, say- that the alleged agreement upon which the action is founded was not executed by defendant or by any one authorized to bind

defendant in the premises, and defendant causes affidavit to be made by its authorized agent that this plea is true.

STATE OF ALABAMA, *Jefferson County:*

Before me, A. W. McCullough, clerk of the circuit court of the United States for the northern district of Alabama, personally appeared Wm. Noble, agent of the Woodstock Iron Company, defendant in the above-entitled cause, and, being duly sworn, deposes and says that the statements of the foregoing plea are
34 true.

(Signed) WILLIAM NOBLE.

Sworn to and subscribed before me this 6th day of March, A. D. 1885.

(Signed) A. W. McCULLOUGH, *Clerk.*

Plea No. 7. And the defendant, for further answer to said complaint, says that the statements of said complaint are not true as therein stated, and defendant, in fact, says that defendant is without power under its charter to execute the alleged agreement upon which said suit is founded, and said alleged agreement is void and cannot be enforced against the defendant.

Plea No. 8. And, for further answer to the complaint, defendant says that plaintiff had no power or authority to make or enter into said alleged agreement, and said alleged agreement is void and cannot be enforced against this defendant.

Plea No. 9. And the said defendant, for further answer to
35 the complaint, says that the statements of said complaint are not true as therein stated; and defendant in fact says the plaintiff was employed by the Georgia Pacific Railway Company to locate and construct said railroad from Atlanta, in the State of Georgia, through the State of Alabama, to Columbus, in the State of Mississippi, and was to be paid by said Georgia Pacific Railway Company —— dollars per mile for the construction of said railroad, payable in whole or in part in the bonds and stock of said railroad; and said John W. Johnson, who negotiated and made said alleged agreement on behalf of plaintiff with defendant to locate and construct, or cause to be located and constructed, said Georgia Pacific railroad by way of the town of Anniston, in consideration of the donation and payment by said defendant, among other things,
36 of the cash sum of thirty thousand dollars, was, at the time of the making of said alleged agreement, an officer, director, and stockholder in said Richmond and Danville Extension Company, and was also an officer, director, and stockholder of said Georgia Pacific Railway Company; and defendant avers that the town of Anniston was not on the line of the nearest, shortest, and cheapest route for said railroad from Atlanta, in the State of Georgia, through Alabama, to Columbus, in the State of Mississippi; and said plaintiff, in making said alleged agreement to construct, or cause to be constructed, said Georgia Pacific railroad by way of the town of Anniston, agreed to deflect or cause the line of said road to

be deflected from its shortest, nearest, and cheapest route through Alabama to Columbus, in the State of Mississippi, and said agreement is contrary to public policy and is void and cannot be enforced against this defendant.

37 Plea 10. And the said defendant, for further answer to the complaint, says that at the time of the making of the alleged agreement stated and set forth in the complaint plaintiff was engaged in locating and constructing the Georgia Pacific railroad under a contract with the Georgia Pacific Railroad Company, under and by which plaintiff agreed with said Georgia Pacific Railroad Company to locate and construct said railroad by the nearest, cheapest, and most suitable route from Atlanta, Georgia, through Alabama, to Columbus, in the State of Mississippi, for a consideration, to wit, twenty thousand dollars per mile for each and every mile of said road so located and constructed.

That John W. Johnston, who negotiated and executed said contract with defendant for plaintiff as vice-president, was, at the time said agreement was made, a stockholder and director of the

38 Richmond and Danville Extension Company, and was also a stockholder and director and officer of the Georgia Pacific Railroad Company; that the Georgia Pacific Railway Company was at said time, and is now, a separate and distinct company, and in no wise connected with plaintiff, except that some of the stockholders of said Georgia Pacific Railway Company were also stockholders in said Richmond and Danville Extension Company, and plaintiff was locating and constructing said road under its contract with said company, as aforesaid.

That in causing said road to be built via Anniston it was necessary to deflect the same from its nearest, cheapest, and most natural route from Atlanta to Columbus a great number of miles, to wit, five miles at a great additional cost to said Georgia Pacific Railroad Company, to wit, one hundred thousand dollars, and defendant avers that said alleged agreement on defendant's part

39 to influence the location of said railroad and to donate and pay to said plaintiff, among other things, the cash sum of thirty thousand dollars if plaintiff would locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific Railroad Company by way of the town of Anniston was and is contrary to public policy and void, and ought not to be enforced against defendant or in favor of plaintiff.

Plea No. 11. And the said defendant, for further answer to said complaint, says that said alleged agreement mentioned in said complaint is without any consideration as to defendant, and is void and not binding on defendant.

HEFLIN, BOWDON & KNOX,
Atty's for Defendant.

Plea No. 11. And the said defendant, for further answer to the complaint, says that at the time of the making of the alleged

40 agreement stated and set forth in the complaint plaintiff was engaged in locating and constructing the Georgia Pacific

railroad, under a contract with the Georgia Pacific Railroad Company, under and by which plaintiff agreed with said Georgia Pacific Railway Company to locate and construct said railroad by the nearest, cheapest, and most suitable route from Atlanta, Georgia, through Alabama, to Columbus, in the State of Mississippi, for a consideration, to wit, twenty thousand dollars per mile for each and every mile of said road so located and constructed.

That said John W. Johnston, who negotiated and executed said contract with defendant for plaintiff as vice-president, was, at the time said agreement was made, a stockholder, director, and officer of the Georgia Pacific Railway Company.

41 That the Georgia Pacific Railway Company, at the time said contract was negotiated, was, and is now, a separate and distinct company, and in no wise connected with plaintiff except that some of the stockholders of the said Georgia Pacific Railway Company (the principal among whom was said John W. Johnson) were also stockholders in said Richmond and Danville Extension Company, and plaintiff was constructing said road under its contract with said company, as aforesaid.

Defendant avers that said John W. Johnson came to Anniston, *came to Anniston*, where defendant resided and did business, and represented to defendant that he was a director and officer of the Georgia Pacific Railway Company and also a stockholder, director, and officer of the Richmond and Danville Extension Company, and could

42 control and induce the location and construction of said Georgia Pacific railroad via the town of Anniston and would do so if the defendant would donate and pay to plaintiff the said sum of thirty thousand dollars in cash, and deed to plaintiff, or as it might direct, the large quantity of real estate described in the complaint, which defendant avers was of value, to wit, twenty thousand dollars, and that said Johnson then and there informed the defendant that unless defendant acceded to his said demand to pay plaintiff said sum of money, and convey to plaintiff, or as it might direct, the large quantity of valuable real estate aforesaid, that said road would not be constructed by the town of Anniston, but would be constructed by way of the town of Oxford, which said town is

43 within three miles of the town of Anniston and is a rival market to said town of Anniston, and thence direct to Birmingham, along the line of a preliminary survey already made; and to secure the location and construction of said road via the said town of Anniston, and to prevent the locating and building of said road by way of the rival town of Oxford, to the exclusion of the town of Anniston, defendant was forced to agree, and did agree, to pay the said sum of thirty thousand dollars in cash, and to convey to plaintiff, or as it might direct, the large quantity of valuable lands described in the complaint, as aforesaid.

And defendant avers that said alleged agreement was and is contrary to public policy and void, and ought not to be enforced against defendant or in favor of plaintiff.

HEFLIN, BOWDON & KNOX,
Att'ys for Def't.

44 (Endorsements:) No. 10. The Richmond & Danville Extension Co. *vs.* The Woodstock Iron Co. Additional pleas for defendant. Filed as of March 6th, 1885, by consent. A. W. McCullough, clerk.

45 In Circuit Court of the United States, at Birmingham, Ala.

RICHMOND & DANVILLE EXTENSION COMPANY
vs.
WOODSTOCK IRON COMPANY.

Now comes the plaintiff in the above-stated cause and demurs to the pleas therein filed by the defendant on the 6th day of March, 1885, and numbered seven, eight, and nine, respectively.

And for causes of demurrer to said plea numbered seven defendant assigns each of the grounds of demurrer heretofore assigned to the plea numbered three, and especially the grounds of demurrer numbered fourth, fifth, sixth, and seventh in the demurrers to said plea numbered three, filed in this cause on the 26th day of February, 1885, and also the following additional grounds of demurrer:

46 First. Said plea does not state any facts showing how or wherein said agreement, upon which this suit is founded, was executed by defendant without authority, but states a conclusion of law.

Second. Said plea does not set out any facts showing that defendant was without authority under its charter to execute the agreement upon which this suit is founded, but merely alleges a conclusion of the pleader.

And to said plea numbered eight defendant assigns the following grounds of demurrer:

First. Under the facts alleged in the complaint and not traversed or denied in said plea defendant cannot deny that plaintiff had the power to make and enter into the agreement which is the foundation of this suit.

47 Second. It is averred in the complaint and not denied by said plea that plaintiff has fully executed and performed said contract on its part, and defendant cannot deny that it, the plaintiff, had authority to execute such contract.

Third. Said plea does not set out any facts showing how or in what manner plaintiff was without authority to execute the agreement sued on, but merely alleges a conclusion of the pleader.

And to said plea numbered nine plaintiff assigns the following grounds of demurrer:

First. That the defendant has not by said plea traversed or denied or attempted to put in issue any matter of fact alleged by the plaintiff, but has introduced and attempted to put in issue matters

48 of fact not alleged nor necessary to be alleged.

Second. That the facts set out in said plea are insufficient in law, either as a traverse or in confession and avoidance of plaintiff's cause of action set out in the complaint filed in this cause.

Third. It appears from the facts set out in said plea that plaintiff had the power and authority to both locate and construct said railroad by said town of Anniston.

Fourth. It appears from the facts alleged in said complaint that plaintiff was authorized to select the route by which said railroad should run, and that it had the agreement sued on.

Fifth. It does not appear from the facts set out in said plea that plaintiff violated any duty it owed to either the Georgia Pa-
49 cific Railway Company or to the public in making the contract sued on.

Sixth. The facts set out in said plea do not show that the agreement sued on was violative of any rule of public policy, or that it was in any manner a corrupt contract.

Seventh. It does not appear from the allegations in said plea that said contract was not made by the consent and at the instance of the said Georgia Pacific Railway Company.

Eighth. It does not appear that said John W. Johnston, who is alleged to have been an officer in each corporation, had any private interest or was to derive any private benefit from the making of said contract, or that he was influenced by any corrupt motive in making the same.

50 Ninth. It does not appear from the facts set out in said plea but what the route chosen was the best route for the running of said road.

Tenth. It does not appear from the allegations of said plea but that the Richmond and Danville Extension Company was authorized and empowered by the Georgia Pacific Railway Company to procure donations to aid and assist in building said road.

Eleventh. It does not appear from the allegations of said plea but that said contract was a part of the consideration paid plaintiff by said Georgia Pacific Railway Company for the building of said railroad.

Wherefore the plaintiff prays judgment of said several pleas, & whether it shall be required to further answer the same.

TROY & TOMPKINS,
Attorneys for Pl'ff.

51 (Endorsements:) No. 10. Richmond & Danville Extension Co. *vs.* Woodstock Iron Company. Demurrers to pleas numbered seven, eight, and nine. Filed March 7, 1885. A. W. McCullough, clerk.

52 Circuit Court of the United States, at Birmingham.

RICHMOND & DANVILLE EXTENSION COMPANY
vs.
THE WOODSTOCK IRON CO.

Now comes the plaintiff and, by leave of the court, demurs to the plea numbered eleven (11) in short, by consent, and assigns as

grounds of demurrer the grounds heretofore specially and particularly assigned to pleas numbered nine and ten.

TROY & TOMPKINS,
Att'ys for Plaintiff.

(Endorsement:) No. 11. The Richmond & Danville Extension Co. *vs.* The Woodstock Iron Co. Demurrer of plaintiff to pleas. Filed in open court this Sept. 17th, 1885. A. W. McCullough, clerk cir. c't.

53 In the Circuit Court of the United Sates at Birmingham, Ala.

THE RICHMOND AND DANVILLE EXTENSION COMPANY
vs.
THE WOODSTOCK IRON COMPANY.

Now comes the above-named plaintiff, and demurs to the pleas filed therein by the defendant on the 6th day of March, 1885, and numbered six, nine, and ten respectively.

And for cause of demurrer to said plea numbered six plaintiff assigns the following grounds of demurrer:

First. That said plea asserts a conclusion of law.

Second. That said plea does not deny that said agreement was executed by Alfred L. Tyler, president, and Samuel Noble, secretary, of the Woodstock Iron Company, and that the corporate seal thereof was attached thereto.

Third. That said plea does not deny that Alfred L. Tyler was the president and Samuel Noble was the secretary of the Woodstock Iron Company at the time of the execution of said agreement.

Fourth. That it is not alleged in said plea that the Woodstock Iron Company, since the execution and delivery of said contract, has not ratified and confirmed the same.

Fifth. That it is not denied by said plea that the Woodstock Iron Company, after the execution of said agreement, did not receive and accept and ratify an acceptance of the said agreement by the plaintiff, as alleged in the complaint.

54 Sixth. That by the said plea it is not denied that the said defendant caused its corporate seal to be affixed to said agreement.

Seventh. That by the said plea it is not denied that the seal attached to said agreement is the corporate seal of the defendant.

And for cause of demurrer to said pleas numbered nine and ten plaintiff assigns to each of said pleas the grounds of demurrer heretofore assigned to plea numbered nine, and filed on the 7th day of March, 1885, and to each of said pleas numbered nine and ten the plaintiff now assigns the following additional grounds of demurrer, viz:

First. That by said plea the said defendant has not set up any matter of fact upon which the plaintiff can take any certain issue.

Second. That it does not appear by said plea that the Georgia Pacific Railroad Company has not acquiesced in, ratified, or con-

firmed the contract made between the plaintiff and defendant for the location of said road.

Third. That it does not appear by said plea that the Georgia Pacific Railroad Company has ever objected to the said construction of said railroad by the town of Anniston, as alleged in the complaint.

Fourth. That it does not appear by said plea that the defendant is a stockholder of or has any interest in the Georgia Pacific Railroad Comany.

55 Fifth. That the defendant cannot take any benefit or advantage of said alleged illegality.

Sixth. That it does not appear by said plea that the said railroad was not built via the town of Anniston by the direction of the Georgia Pacific Railroad Company.

Seventh. That it does not appear by said plea that the said road was not built via Anniston with the knowledge and consent of the said Georgia Pacific Railroad Company.

Eighth. That it does not appear by said plea the said Georgia Pacific Railroad Company has not received and accepted the said road so constructed via Anniston with full knowledge of the contract alleged in said plea.

Ninth. That by the said plea it is not denied that the contract, as alleged in the complaint, was the contract entered into between the plaintiff and defendant, and by the said contract, as alleged in said complaint, the plaintiff did not contract to locate and construct said road by the nearest, cheapest, and most suitable route from Atlanta, Georgia, through Alabama, to Columbus, Mississippi, as alleged in said plea.

TROY & TOMPKINS,
Pl'ff's Atty's.

(Endorsement:) Richmond & Danville Extension Company *vs.* Woodstock Iron Co. Demurrers to pleas numbered six, nine, and ten. Filed March 6th, 1885. Filed in office this 5th day of September, 1885. A. W. McCullough, clerk.

56 THE UNITED STATES OF AMERICA,
Northern District of Alabama:

Be it remembered that heretofore, to wit, on the 17th day of September, A. D. 1885, it being a day of a regular term of the circuit court of the United States for [the] southern division of the northern district of Alabama, begun and held at the United States court-rooms in the city of Birmingham, in said district, on the 1st Monday of September, A. D. 1885, and of the Independence of the United States of America the one hundred and 10th year—present, the Hon. John Bruce, judge of the district court of the United States for the northern district of Alabama, presiding—the following order was had and entered of record on the minutes of said circuit court, to wit:

RICHMOND AND DANVILLE EXTENSION COMPANY
vs.
THE WOODSTOCK IRON CO. } 10.

Now comes the plaintiff and moves to strike out the plea of the defendant numbered six, and, after hearing counsel, it is considered by the court that said motion be overruled, and the court having heard the demurrers of the plaintiff to the pleas of the defendant numbered six, seven, eight, nine, ten, and eleven, and after hearing argument by counsel for the parties, it is considered by the court that the said demurrers to each of said pleas numbered six, seven, eight, nine, ten, and eleven be sustained; to which ruling of the court the defendant, by counsel, excepts.

And now comes the plaintiff, by its attorneys, and comes the defendant, by its attorneys, and comes a jury of twelve good and lawful men, to wit, W. G. Hafner and eleven others, who, being duly empaneled and sworn well and truly to try the issue joined between the plaintiff and the defendant, and a true verdict render according to the evidence, and having heard the evidence and the charges of the court, say on their oaths: We, the jury, find all issues in favor of the plaintiff and assess its damages at twenty-seven thou-
57 sand and sixty-seven and $\frac{42}{100}$ dollars.

It is therefore considered by the court that the plaintiff have and recover of the defendant the said sum of twenty-seven thousand and sixty-seven and $\frac{42}{100}$ dollars, together with the costs of this action, and that execution issue therefor.

58 *Petition.*

THE RICHMOND AND DANVILLE EXTENSION COMPANY, a Body Corporate under the Laws of New Jersey,
vs.
THE WOODSTOCK IRON COMPANY, a Body Corporate under the Laws of Alabama.

Judgment in circuit court for southern division of the northern district of Alabama, rendered Sept. 17th, 1885, in favor of plaintiff for $27,068.00, besides costs of suit.

And now comes the Woodstock Iron Company, the defendant in said circuit court in said above-entitled cause, by attorney, and says that in the record and proceedings of said circuit court, and also in the judgment rendered by said court in said cause, there have happened manifest errors, to the great damage of the Woodstock Iron Company, and the said Woodstock Iron Company hereby points out and assigns the following cause of error, namely:

1st. The court erred in overruling the demurrer of defendant to the plaintiff's complaint, and a separate cause of error is hereby assigned to the action of the court in overruling each ground of said demurrer.

2nd. The court erred in sustaining the plaintiff's demurrer to defendant's pleas numbered, respectively, three, five, six, seven, eight,

nine, ten, and eleven, and separate causes of error are hereby assigned to the action of the court in sustaining the demurrer to each one of said pleas.

59 3rd. The court erred in the judgment rendered in said cause.

Wherefore, because of said manifest errors in said record, proceedings, and judgment of said court in said cause, the said Woodstock Iron Company prays that said judgment of said circuit court in said cause may be reversed and held for naught.

And to the end that said cause may be considered and said error duly corrected, the said Woodstock Iron Company prays for a writ of error causing the record and proceedings in said cause, with all things concerning the same, to be sent to the Supreme Court of the United States, so that the same may be had at the city of Washington on the third Monday of the present term of said Supreme Court, namely, the 26th day of October, A. D. 1885, in said Supreme Court.

ALFRED L. TYLER,
President W. Iron Co.

Endorsed: Filed in clerk's office Oct. 19, 1885. A. W. McCullough, clerk. Petition for writ of error.

60 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the circuit court of the United States for the southern division of the northern district of Alabama, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the Richmond and Danville Extension Company and the Woodstock Iron Company, a manifest error hath happened, to the great damage of the said The Woodstock Iron Company, as by its complaint appears, we, being willing that the error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the third Monday of the present term, to wit, October 26, 1885, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court, the 19 day of October, 1885, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal Circuit Court U. S., N. D. of Ala., Sou. Div.]

A. W. McCULLOUGH,
Clerk of the Circuit Court of the U. S., N. D.

61 Endorsed: United States circuit court for the southern division of the northern district of Alabama. No. 10. The Richmond and Danville Extension Company *vs.* Woodstock Iron Company. Writ of error. Filed October 20, 1885. A. W. McCullough, clerk.

We accept service of the within writ & waive copy this 20 day of October, 1885.

TROY, TOMPKINS & LOUDON,
Att'ys for R. & D. Ex. Co.

62 *Bond.*

The Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

THE RICHMOND AND DANVILLE EXTENSION CO.
vs.
THE WOODSTOCK IRON COMPANY.

Know all men by these presents that we, the Woodstock Iron Company, are held and firmly bound unto the Richmond and Danville Extension Company, its successors and assigns, in the sum of fifty-four thousand one hundred and thirty-six dollars, to be paid to said Richmond and Danville Extension Company, its successors, assigns, executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 20th day of October, 1885.

Whereas the above-named The Woodstock Iron Company has prayed and obtained a writ of error to the Supreme Court of the United States to revers the judgment rendered in the above-entitled action by the circuit court of the United States for the southern division of the northern district of Alabama: Now therefore the *the* condition of this obligation is such that if the above-named The Woodstock Iron Company shall prosecute its said writ of error to effect, and answer all damages and costs, and satisfy such judgment as the Supreme Court may render in the premises if it shall fail to make good its said plea, then this obligation to be void; otherwise to remain in full force and virtue.

WOODSTOCK IRON CO., [SEAL.]
By ALFRED TYLER, *President.*
ALFRED TYLER.
SAMUEL NOBLE. [SEAL.]
JOHN W. NOBLE. [SEAL.]

Sealed and delivered in presence of—
F. M. HEIGHT &
V. H. MARSHALL.

The above security is approved this Oct. 20, 1885.

JOHN BRUCE,
District Judge of the United States, Nor. Dist., Ala.,
Sitting as Circuit Judge.

63 Endorsed: United States circuit court for the southern division of the northern district of Alabama. Richmond & Danville Extension Company *vs.* Woodstock Iron Company. Supersedeas bond. Filed October 20th, 1885. A. W. McCullough, clerk.

64 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To the Richmond and Danville Extension Company, a body corporate under the laws of New Jersey, or Mrss. Troy, Tompkins, and Lindon, its attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the third Monday of the present term, to wit, October 26, 1885, pursuant to a writ of error filed in clerk's office of the circuit court of the United States for the southern division of the northern district of Alabama, wherein the Woodstock Iron Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 20 day of October, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal Circuit Court U. S., N. D. of Ala., Sou. Div.]

JOHN BRUCE,
District Judge of The United States, N. D. Alabama,
Sitting as Circuit Judge.

Endorsed: Original. United States circuit court, southern division of the northern district of Alabama. No. 10. Richmond & Danville Extension Co. *vs.* Woodstock Iron Co. Citation to defendant. Filed October 20, 1885. A. W. McCullough, clerk.

We accept service of the within citation and waive copy this 21st day of October 1885.

TROY, TOMPKINS, & LOUDON,
Att'ys for R. & D. Ex. Co.

65 UNITED STATES OF AMERICA,
Northern District of Alabama:

I, A. W. McCullough, clerk of the circuit court of the United States of America in and for said district, do hereby certify that the above and foregoing is a true, full, and complete transcript of the proceedings had in the cause of the Richmond and Danville Exten-

sion Co. *vs.* The Woodstock Iron Company as fully as the same does appear on file or of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at office, in the city of Huntsville, in said district, this 22nd day of October, A. D. 1885.

[Seal Circuit Court U. S., N. D. of Ala., Sou. Div.]

A. W. McCULLOUGH,
Clerk of the U. S. Circuit Court.

Endorsed on cover: N. Alabama C. C. U. S. No. 773. The Woodstock Iron Company, plaintiff in error, *vs.* The Richmond and Danville Extension Company. Filed October 24, 1885.

DEC 17 1898
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

No. 180.

THE WOODSTOCK IRON COMPANY

vs.

THE RICHMOND AND DANVILLE EXTENSION COMPANY.

Brief and Argument of John B. Knox for the Plaintiff in Error.

OUR MOUNTAIN HOME PRINT, TALLADEGA, ALA.

FILED
DEC 17 1888
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

No. 180.

THE WOODSTOCK IRON COMPANY

vs.

THE RICHMOND AND DANVILLE EXTENSION COMPANY.

Brief and Argument of John B. Knox for the Plaintiff in Error.

OUR MOUNTAIN HOME PRINT, TALLADEGA, ALA.

ABSTRACT OF CASE WITH ASSIGNMENT OF ERRORS.

The defendant in error recovered judgment against the plaintiff in error for the breach of an agreement, whereby it is alleged the latter agreed to pay the former the sum of thirty thousand dollars, to induce the location of the Georgia Pacific Railroad by way of the town of Anniston. It is alleged that the defendant in error complied with the contract on its part, but that the plaintiff in error refused to pay said sum of money, except six thousand three hundred dollars and hence the suit. The complaint contains two counts each of which state substantially the same cause of action. Record pp. 1–5.

A demurrer was interposed to the complaint, and to each count separately, in the Court below, assigning in substance the following causes of demurrer: 1, That the agreement sued on was without consideration. 2, That the contract which is the foundation of the suit is contrary to public policy and void. (Record p. 11). The demurrer was overruled. (Record p. 14). The defendant thereupon filed eleven separate pleas interposing in substance the following defences: 1, The general issue. (Record p. 6). 2, The illegality of the contract. See special pleas Nos. 9, 10, 11. (Record p. p. 15, 16, 17). 3, *Ultra vires*. See plea No. 3 (Record p. 6). 4, *Non est factum*. See plea No. 6. (Record p. 14).

The plaintiff demurred to pleas Nos. 3, 5, 6, 7, 8, 9, 10, and 11, interposing the defences of illegality, *ultra vires*, and *non est factum*. (Record pp. 12, 13, 18, 19, 20, 21). The Court below sustained the demurrers to each of these pleas. (Record pp. 14, 22.

The assignments of error insisted on are:

First—The Court erred in overruling the demurrer of defendant to the plaintiff's complaint and a separate cause of error is assigned to the action of the Court in overruling each ground of said demurrer. (Record p. 22).

Second—The Court erred in sustaining the plaintiff's demurrer to defendant's pleas Nos. 3, 5, 6, 7, 8, 9, 10, 11, and separate causes of error are assigned to the action of the Court in sustaining the demurrer to each one of said pleas. (Record pp. 22–3)

Third—The Court erred in the judgments rendered in said cause. (Record p. 23).

Supreme Court of the United States.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

No. 180.

THE WOODSTOCK IRON COMPANY

vs.

THE RICHMOND AND DANVILLE EXTENSION COMPANY.

Brief and Argument of John B. Knox for the Plaintiff in Error.

STATEMENT OF CASE.

The Richmond and Danville Extension Company, a corporation created under the laws of the State of New Jersey, filed its complaint in the court below against the Woodstock Iron Company, a corporation formed under the laws of Alabama, for the recovery of thirty thousand dollars.

In the first count, it is alleged that the defendant agreed if the plaintiff would locate and construct, or cause to be located and constructed, the railroad of the Georgia Pacific Railroad Company by way of the town of Anniston, it, the said defendant, would donate and pay to the plaintiff the cash sum of thirty thousand dollars, to be paid in money, one-half when the Georgia Pacific Railroad Company connected its line with the line of the Alabama Great Southern Railroad Company at or above Birmingham, Alabama, and the remaining one-half, when the said line was connected

with the line of the Louisville and Nashville Railroad Company at or above the City of Birmingham, provided, said connections were made in three years from the making of said contract. That the plaintiff performed the agreement on its part, and that the defendant failed to pay the sum of thirty thousand dollars aforesaid, except the sum of six thousand three hundred and twenty-five dollars, and hence the suit.

By the *second count* the cause of action stated is the same as in the first, the alleged agreement, the foundation of the suit, being set out *in hæc verba.*

The following is the language of the agreement so far as is material to the questions presented for the consideration of this court: "The Woodstock Iron Company makes to the Richmond and Danville Extension Company the proposition following, that is to say: If the Richmond and Danville Extension Company will locate and construct or cause to be located and constructed the railroad of the Georgia Pacific Railroad Company (or the new consolidated company now being formed to be known as the Georgia Pacific Railroad Company), by way of the town of Anniston, the Woodstock Iron Company will donate and convey or caused to be donated and conveyed to the Richmond and Danville Extension or as it may direct": (Here follows a description of certain real estate in the City of Anniston.) * * "The Woodstock Iron Company will aid the work of construction and especially so of the sidings or spare tracks for the furnace, by the judicious wasting of the furnace cinder and other material; and the said company will in a general way do all it can to facilitate the work and advance the business of the railroad company whose location it invites; and the Woodstock Iron Company will donate and pay to the Richmond and Danville Extension Company, or as it may direct, the cash sum of thirty thousand dollars, paying the same in money as to one-half, that is, fifteen thousand dollars when the Georgia Pacific Railroad Company connects its line with the line of the Alabama Great Southern Railroad Company at or above Birmingham, Alabama; and as to the other half, that is to say, fifteen thousand dollars, when the Georgia Pacific Railroad or railway company connects its line with the line of the

Louisville and Nashville Railroad Company (the South and North Alabama Railroad Company), at or above Birmingham, Alabama, the above to be paid only provided the Georgia Pacific Railroad or railway company is so far completed as to make the connections above within three years from this date."

It is alleged that the defendant was a corporation engaged in manufacturing iron in the town of Anniston, Alabama, and besides its works, owned large quantities of valuable property in said place. That the railroad referred to in said contract was a road then in process of construction to be run from Atlanta, Georgia, through the State of Alabama to Columbus in the State of Mississippi. That plaintiff caused the said railroad to be located and constructed by the town of Anniston, and otherwise complied with the agreement on its part, but that defendant, although it conveyed the land mentioned in the agreement, refused to pay the thirty thousand dollars, except the sum of six thousand three hundred and twenty-five dollars paid in cars furnished to the Georgia Pacific Railroad Company, on account of said cash payment at request of plaintiff, and hence the suit.

DEMURRER TO COMPLAINT.

The defendant demurred to the complaint and to each count separately, stating in substance the following grounds of demurrer: I. The facts stated in complaint show no cause of action against the defendant; II. The alleged agreement is without consideration as to defendant and cannot be enforced; III. The contract upon which the suit is based is contrary to public policy and void; IV. The agreement of defendant to donate and pay plaintiff thirty thousand dollars, among other things, if said plaintiff would locate and construct, or cause to be located and constructed the railroad of the Georgia Pacific Railroad Company, by way of the town of Anniston, is contrary to public policy and void.

DEFENDANT'S PLEAS.

The defenses set up in the pleas are in substance as follows: I. The general issue; II. The illegality of the contract; III. *Ultra vires;* IV. *Non est factum.*

THE ILLEGALITY OF THE CONTRACT.

This defense is raised by the demurrer to the complaint (Record, p. 11), and also by special pleas Nos. 9, 10, 11 (Record, pp. 15, 16, 17).

From the complaint it clearly appears that the sum of money demanded by plaintiff is claimed as compensation for influencing and securing the location of the railroad of the Georgia Pacific Railroad Company to Anniston. The demurrer to the complaint was overruled and the defense was renewed in three special pleas. Plaintiff's demurrer to each of the pleas was sustained.

By pleas Nos. 9 and 10 it appears that the plaintiff was employed by the Georgia Pacific Railroad Company to build its railroad from Atlanta in the State of Georgia, through the State of Alabama to Columbus in the State of Mississippi, receiving therefor twenty thousand dollars for each mile constructed. That the plaintiff being charged with the duty of locating and building said railway for its principal, agreed with defendant to build the road by Anniston for the thirty thousand dollars and the real estate mentioned in the pleadings (Record, pp. 15, 16). It also appears from plea No. 11 that the agent who managed the negotiations for plaintiff, its vice-president was also interested in the Georgia Pacific Railroad Company, being an officer, director and stockholder in both companies, and informed the defendant if it did not pay the amount demanded, the plaintiff would cause the said railroad to be built by Oxford (a rival market), to the exclusion of Anniston (Record, pp. 16, 17).

The courts have uniformly held such contracts illegal. The plaintiff was the agent of the railroad company charged with the important duty of locating its line between the main terminal points mentioned in the charter; in the location of the line the public as well as the railroad com-

pany was directly interested; the plaintiff could not therefore be allowed to enjoy the benefit of a contract the direct tendency if not effect of which, was to make it sink the interests of its principal and the public, to enrich itself.

The leading case on this line is Fuller vs. Dame (18 Pick. 472). In that case Dame, the defendant, was the owner of a large tract of land and flats situated on Sea street in the city of Boston, which it was supposed would be enhanced in value, if the Boston and Worcester Railroad Company could be induced to enter the city on that side (the South side), and locate one of its depots or principal places of deposit, between said Front street and Sea street. In consideration of defendant's (Dame) note for nine thousand six hundred dollars, the plaintiff, (Fuller), agreed to aid in causing or inducing said railroad company to enter said city on the South side and to locate one of its depots or principal places of deposit as above expressed, it being understood that Fuller himself was of the opinion that said railroad ought, from a view of the public good and the good of its stockholders, to enter the city on the South side and locate one of its depots or principal places of deposit between said Sea street and Front street. Fuller was a stockholder in the railroad at the time the agreement was made, and it was shown, that the company built its railroad and located one of its depots between the streets above named, and the suit was on the note. *Held*, that the contract was contrary to public policy and void.

To the same effect is the case of Holaday vs. Patterson (5 Oregon, 177). In that case Holaday being a director and president of the Oregon and California Railroad Company and owning a controlling interest in the stock of said company, agreed with Patterson that in consideration of a certain sum of money he would cause the line of said road to be located on a certain route, and a depot to be built at a certain place, instead of adopting another route then surveyed, which was shorter and over which said road could be constructed at less expense: *Held*, that the contract was contrary to public policy.

Another important and well considered case is the Pacific Railroad Company vs. Seely (45 Missouri, 212). Seely

agreed in consideration that the Pacific Railroad Company would locate a freight and passenger station on his land, to deed to the company four acres of land for freight and passenger stations, and to lay off into town lots one hundred and sixty acres of land in such manner as the engineer of said company should direct, and to make a deed to an undivided one-fourth part thereof to such persons as the company should direct. *Held*, that although in one sense the company was a private corporation, yet its charter privileges were granted in part to subserve a great public interest; that such an agreement might be superinduced by prospects of mere gain, and thus the general wellfare and good of the public might be sacrificed to subserve mere private interests; that for this reason such an agreement was void as against public policy.

The case of Bestor vs. Wathen (60 Illinois, 138) is even stronger on this point.

In that case, the railroad company made a contract with the firm of Cruger, Secor & Co., to build and equip the road. While engaged in the work of locating and constructing said road the members of said firm with Bestor, the President, Sweat, one of the Directors, and Smith, its construction agent, entered into a contract with the defendants, Wathen et al, by which in consideration of the location of said road so as to cross the Illinois Central Railroad on their land, they agreed to give said parties an undivided one-half interest in an hundred and sixty acres of land through which said road was proposed to be located. *Held*, that the agreement was void as against public policy.

The Court says: "Rendered in plain English the contract in this case was a bribe on the part of Wathen and Gibson to the President and other officers of the railway company, and to the contractors who were building the road, of an undivided half of one hundred and sixty acres of land, in consideration of which the road was to be constructed on a certain line and a depot built at a certain point. Now if this was the best line for crossing the Illinois Central considered with reference to the interest of the stockholders and of the public, then it was the duty of the officers of the company to establish it there; and if they intended

so to do because it was the proper line, but professed to be hesitating between this and another line in order to secure to themselves the contract under consideration, as is somewhat indicated by the evidence, then they were practicing a species of fraud upon the defendants and the use of a false pretext in order to acquire defendant's property without consideration. If on the other hand this line was not the best, but was adopted because of this contract, the case is still stronger against the complainants. If such was the fact they are asking the Court to enforce the payment of a bribe, the promise of which induced them to sacrifice their official duty to their private gain. If, as a third contingency, the choice lay between this line and another equally good, but not better, and they were influenced by this contract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity can sanction. In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts, because of the great temptation they would offer to official faithlessness and corruption."

The case of Bestor vs. Wathen *supra*, is a leading case in Illinois on this question and has been cited, approved, and followed, in all subsequent cases.

In the case of Linder vs. Carpenter (62 Illinois,309),it was held that a contract made with officers of a railroad company to induce them to establish the road at a given point, is against public policy as tending to sacrifice the interests of the stockholders and the public, and will not be enforced. And see Markh vs. Fairburg Railroad Co. (64 Illinois, 414); St. Louis Railroad Co. vs. Mathers (71 Illinois, 592.)

In the case of Dudley vs. Cilley (5 New Hamp. 558), there was a petition to lay out a public highway and it was decided that the public good required the construction of the road. In fixing the route of the road it became necessary to make compensation to certain owners whose land was taken, and the petitioners for the road agreed to pay these amounts and executed their notes for the same. *Held*, in a suit on the notes, that the contract was contrary to public

policy and void. And see Dudley vs. Butler (10 New Hamp. 281).

In Davidson vs. Seymour (1 Bosworth, 88), the plaintiff was employed by the firm of Seymour & Co. to procure for the firm from the directors of a railroad company a contract for building the road, and was to be paid for his services in case he succeeded in obtaining the contract, the sum of ten thousand dollars. The plaintiff recommended said firm to one Clements, who appeared before the Board of Directors, and mainly upon the recommendation of said Clements the contract was awarded to Seymour & Co. *Held*, upon a suit by plaintiff to recover his compensation, that the contract was contrary to public policy and void.

In Cook vs. Sherman (16 Am. & Eng. R. R. Cas., 561) the officers and directors of a railroad company entered into a contract to purchase land and to locate the line of their projected road and its depots and stations on or near the lands so purchased. *Held*, that such a contract is contrary to public policy and will not be enforced or made the basis of any relief. McCrary, Justice, says: "If the Court should enforce such contracts, they would lend their sanction to a practice the inevitable tendency of which is to encourage breeches of trusts to the sacrifice of private rights and to the public interest. The managing officers of *quasi* public corporations, possessing vast powers and engaged in great enterprises, are too apt to forget that they are not to have any interest adverse to those whom they represent, and the courts of justice should not in the least relax the rule requiring of them scrupulous fidelity and entire impartiality in the discharge of their official duties. The present case well illustrates the importance of the rule of law to which we refer. The parties interested in this contract control the location of the railroad and of its depots and station grounds. After they had bought lands along the line, with the view of making money by the location of the line and of the depots and stations upon or near them, it needs no argument to show that they were utterly unfit and incompetent to decide as between a location upon their own land and the location elsewhere."

In Union Pacific Company vs. Durant (1 Centr. Law Journal, 581), an officer of a railroad company secured certain

donations from the citizens of Omaha, conditioned on the location of the terminus of the railroad at that place, and as inducement to stimulate subscriptions, notified the citizens, that unless subscriptions were made the terminus might be put elsewhere. The deeds were made to "Thomas C. Durant, Trustee," who was the acting President and General Manager of the Railroad Company. After the road was located, the Company filed its bill to execute the trust. The case was decided by Judge Dillon, who held that the securing of donations to influence the location of the road was an improper use of power by the President and contrary to public policy, and the original agreement being illegal, the company could not be allowed to adopt and profit by it.

And see also the following cases, where similar agreements have been held contrary to public policy and void, Western Union Telegraph Co. vs. Union Pacific R. R. Co., 3 Federal Rep., I; Elkhart vs. Crary, 98 Ind. 238; Noel vs. Drake, 28 Kan. 265; Byrd vs. Hughes, 84 Ill. 174; Smith vs. Applegate, 23 New J. Law, 352; Callogan vs. Hallet, 1 Caines Rep. 103.

In Providence Tool Company vs. Norris (2 Wallace, 45), a question somewhat similar to the one involved here, was considered by this court. In that case Norris was employed by the Tool Company to procure from the Government a contract to make arms, which he succeeded in doing. It does not appear that Norris used any unlawful means in procuring the contract or that it was an undesirable one for the Government. *Held*, upon a suit to recover compensation, that the agreement was contrary to public policy and void. In the opinion, Mr. Justice Fields says: "We have not met any adjudication on an agreement precisely similar, but the principal which determines its invalidity has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation for procuring legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency of the agreement. * * The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing the recognition in any of the courts of the country."

In this case the Court cites approvingly the case of Fuller vs. Dame (18 Pick. 472), and said case is also cited and approved by this Court in Marshall vs. the Baltimore & Ohio R. R. Co. (16 Howard 314.)

It is well settled both on principle and authority that the officers or agents of a company occupy towards it a fiduciary capacity, and can not lawfully make use of that position to enter into contracts whereby they secure to themselves personal advantages. This is decided in Wardell vs. Union Pacific R. R. Co. (103 U. S., 651), and in a great number of cases. Koehler vs. Hubby, 2 Black (U. S.) 715.

CASES CITED TO SUSTAIN THE CONTRACT.

The cases that have been cited to sustain the contract sought to be enforced in this case are not in conflict, in the principles decided, with the foregoing authorities. It will be observed, that in the case at bar and in the cases relied on by the plaintiff in error, the consideration moved to some agent or officer of the railroad company, and was to be paid to influence the location of the road. The cases cited for defendant in error turned upon a different principle, and may be divided into three classes: *First*—Where the gift, donation, or subscription, was made to aid the railroad company and not conditioned upon the adoption of any specified route. *Second*—Agreements to take stock in the railroad company, provided a particular route is adopted. *Third*—Where the agreement is made with the railroad company *itself* to donate or pay a certain consideration, when the road is located and built to a certain place.

1. Under the *first* class are the following cases, and many others that might be cited: Stevens vs. Corbitt, 33 Mich. 458; Michigan Midland R. R. Co. vs. Bacon, ib. 466; Rose vs. San Antonio R. R. Co., 31 Texas, 49; Carlisle vs. Terre Haute R. R. Co., 6 Ind. 316; Des Moines R. R. Co. vs. Graff, 27 Iowa, 99.

In none of these cases were the subscriptions made to influence the location of the road. The route had been selected and determined upon; the amount subscribed was payable directly to the railroad company in aid of the enterprise, and contravened no principle of public policy. It is

not insisted that a railroad company may not receive subscriptions to aid its construction, and that these donations may not be made payable upon the completion of the road. In none of these cases was any point made against the policy of such subscriptions.

2. Under the *second* class it will be found that there are quite a number of cases where agreements to take stock in a railroad company provided a particular route is adopted, have been sustained. In most of the cases under this head the question of public policy involved in such subscriptions was not brought to the attention of the court, the defense relied on being want of mutuality; in such cases the court treated them as mere open propositions and not contracts until accepted by the company, and they are sustained upon the idea that when accepted the stock received by the subscriber is consideration for the promise. In New York, where the question of public policy involved in such contracts has been presented, they have been declared void as against public interest.—21 Wendell, 139; 18 Barber, 317; 1 Hill, 518; 15 New York, 583.

In Pennsylvania, where such conditional subscriptions are made to commissioners, the condition has been held to be void and the subscription absolute. Upon the question of public policy involved in such subscriptions, Judge Strong, speaking for the Court of that State, says: "Besides a stipulation for a particular route of the projected canal or railway is in other respects against the policy of the law, and therefore illegal. The law casts upon the Board of Directors who may be chosen after the organization of the company, the selection of the route. In the choice of this Board, each subscriber is to have a voice proportionate to the amount of his stock. The State is interested, as well as the stockholders and the corporation, in having this Board exercise an unbiased judgement. But a stipulation in a subscription in favor of a particular route if it have any efficacy, tends to deprive the State and stockholder of the benefits of such untrameled selection, and it is conceivable that it might entirely destroy the public utility of the enterprise. If it be urged, that the construction of the road over a designated route may be regarded as a part of the consideration for the promise to pay the subscriptions, it does not alter the case;

such a stipulation is none the less illegal." Pittsburgh R. R. Co. vs. Bigger (34 Penn. St. Rep. 458). The rule as to such subscriptions is thus cautiously stated by Mr. Pierce: "Such conditional subscriptions have been sustained, when not expressly prohibited, and not in conflict with public policy." Pierce on railroads, P. 59. And see Morawetz on Corp. Sec. 495 1st Ed.

3. Of the *third* class there are only a few cases, the greater part of which have been decided by the Supreme Court of Iowa.

The Railroad Company vs. Palmer, (42 Iowa 222) cited upon this point, was an action to enforce an agreement wherein a railroad had undertaken for a monied consideration to extend its road to the town of Vinton, *and not to erect another depot within seven miles of said station.* The contract was upheld. The defense of illegality was not made in the case however, and does not seem to have been considered by the Court. This case is in conflict with every other case that has been decided upon the question, and is in effect overruled by a later and better considered opinion of the same Court. See Williamson vs. Chicago R. R. Co. (53 Iowa 126); Pueblo &c. R. R. Co. vs. Taylor, (6 Colorado 1).

In the case of the Railroad Company vs. Spofford (41 Iowa 292) the railroad company had located or was about to locate its road through defendant's farm in such a way as to greatly injure his valuable lands, and he agreed to pay the company a certain amount to slightly change the line of location over his place, so as not to cross his best lands. The opinion in the case is very short, and the principal of public policy involved in agreements to change the location for a consideration is not considered by the Court. In the location agreed on the road was made to cross another highway, and the case went off on a consideration of the policy of building railroads over existing highways, or along, or near them.

The case of the National Bank vs. Hendree (49 Iowa 403) is the only one where the policy of such contracts is considered by the Court. In that case, suit was brought on notes given directly to the railroad company to induce it to build its road to Council Bluffs. The Court avoids the defense of illegality upon somewhat peculiar reasoning. It was held,

that the contract was not shown to be aginst the public interest, because it did not appear but that the route adopted by the company in pursuance of the agreement was as good as could have been secured. But this is not the principle upon which the validity of such contracts is determined. It is entirely immaterial whether the location of a road induced by a bribe, or other consideration, is desirable or undesirable; it is considered that the general tendency of such contracts is against public interest, and the courts therefore refuse to enforce them.

It is not necessary however to question the authority of this case, as it turns upon a different principle from the one involved in the case at bar, and is expressly distinguished by the Court from the cases relied on for the plaintiff in error. The Court seems to think that the case of Holaday vs. Patterson cited *supra*, asserted a different doctrine, but in this it was in error, as that case is placed upon the ground that the consideration to induce the location of the road moved to the agent, and not directly to the railroad company. See Holaday vs. Patterson, 5 Oregon 177.

THE CONTRACT IS ULTRA VIRES.

The plaintiff in error is a private corporation, organized under the provisions of the Revised Code of Alabama of 1867, for the manufacture of pig iron, and the character and extent of its powers to make contracts, must be determined by the terms of the statute under which it was incorporated. The only provision of the charter bearing upon the capacity of the company to make the contract in question, is as follows: "The name of said company shall be the Woodstock Iron Company, and its object, the manufacturing of pig metal and other products of iron ore, and making sale thereof, connecting with said business all such operations as are usual and incidental thereto." Section 1767 of the Revised Code of Alabama of 1867, gives said company power "to hold, purchase, dispose of and convey, such real estate as is limited by its charter; and if not so limited such an amount as the business of the corporation requires." No other powers are given in the charter or by the statute, but in order to restrain the corporation to the powers expressly

given, the statute contains the following provisions: "In addition to the powers enumerated in section 1767 and to those expressly given in its charter, no private corporation possesses or can exercise any corporate powers, except those necessary to the exercise of the powers thus given."—Revised Code of 1867, Sec. 1769.

This statement of the powers of the company as defined by the charter and the statute under which the corporation was formed, is sufficient to show that the contract was *ultra vires*. Being organized to make pig iron, it could not without violating its charter, divert a large part of its funds to encourage or support an independent railroad enterprise. (Record p. 6, plea No. 3.)

In Alabama, corporations are held strictly to the powers expressly granted, and such as are necessary to the exercise of the delegated powers. The Court adopts the rule declared by the Supreme Court of Pennsylvania, in Pennsylvani Railroad Co. vs. Canal Commissioners (21 Penn. St. Rep. 22) where it is said: "When the State means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers that belong to her, it is so easy to say so, that we will never believe it to be meant when it is not said." And again: "In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation.—Grand Lodge of Alabama vs. Waddill, 36 Ala. 318. The same rule has been declared in somewhat different terms by this Court, in Rice vs. Railroad Company (1 Black U. S. 380), where it is said: "Taken altogether these cases may be regarded as establishing the general doctrine, that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in clear and explicit terms."

A contract by which a corporation agrees to pay money for a purpose not authorized by its charter, is illegal and void, and no action can be maintained thereon.—McGregor vs. D. & D. Road Co., 16 Eng. Law & Eq. 180.

A corporation created for the purpose of building a plank road, guaranteed the payment of a loan made by a corpora-

tion of like character to enable it to build its road, the completion of which would be advantageous to the former. *Held*, that the agreement was *ultra vires* and void.—Mad. Plank Road Co. vs. Watertown Plank Road Co., 7 Wisc. Rep. 59.

A railroad company authorized by its charter to construct and operate a railroad between certain terminal points has no power, express, implied or incidental, to purchase and run a steamboat in connection with its line, nor to form a partnership with a natural person to carry on such business.—Central R. R. Co. vs. Smith, 76 Ala. 572. Corporations organized to construct and operate railroads have no power to buy steamboats to run in connection with their road.—Pierce vs. Railroad Co., 21 Howard, (U. S). 441.

By section 1769 of the Revised Code of Alabama, of 1867, corporations in this State are expressly prohibited from exercising any powers not granted in the charter. In the State of New Jersey they have a similar statute, which is construed in Morris, etc., R. R. Co. vs. Sussex, etc., R. R. Co., (20 New Jersey, 542). The court there says: "Whether without that section the common law would fully reach up to that measure upon any implication, that powers not so granted or implied, are prohibited, need not now be determined. It is sufficient that the terms of this enactment are plain and its meaning can not be misunderstood. And that when a corporation exercises powers outside of those permitted by that section, its action is obnoxious to the charge, that there is not only a want of authority, but that it is *against an express enactment.*"

WAS DEFENDANT ESTOPPED?

It is insisted that the plaintiff in error was estopped from interposing the defense of *ultra vires*. It is true, that there are many cases in the State and Federal courts which apply the doctrine of estoppel in such a case, and refuse to allow the corporation to plead its want of authority to make a contract. These cases are not followed in Alabama, the settled doctrine in this State being that the doctrine of estoppel does not apply. The question has come before the Supreme Court of this State many times, and the court has in every case refused to apply the doctrine of estoppel, in ac-

cordance with a settled policy to restrain corporations within the limits of the powers expressly granted to them. The Court says: "In such case the doctrine of estoppel can not be held to apply, without clothing corporations with the ability to increase their powers indefinitely by sheer usurpation."—Marions Saving Bank vs. Duncan, 54 Ala. 473; Chambers vs. Falkner, 65 Ala. 448; Grand Lodge of Alabama vs. Waddell, 36 Ala. 318; Ex parte Burnett, 30 Ala. 461; City Council, etc., vs. Plank Road Co., 31 Ala. 76; The City of Eufaula vs. McKnabb, 67 Ala. 588; Central R. R. Co. vs. Smith, 76 Ala. 572; State vs. Stebbins, 1 Stewart, 308.

In passing upon the power of the plaintiff in error to make the contract sued on in this case, it will be necessary to construe the statute laws of Alabama, under which the corporation was formed. It is respectfully submitted, if this court should not adopt the construction which the courts of Alabama have placed upon those statutes, and uphold the general legislative and judicial policy adopted in that State, to restrain corporations within the limits of their charter powers? The statute of the United States requiring its courts to follow the State courts, where they are sitting, in the construction of their laws, is based upon the idea, that there should be no unseemly conflict between the rules of law declared in the same State, by the courts of the general government and the courts of the States. This policy is founded in sound sense, and ought not to be disregarded.—Ohio Ins. Co. vs. DeKalb, 16 Howard (U. S.), 431; Cristy vs. Pridgeon, 4 Wallace (U. S.), 196.

NON EST FACTUM.

Plea No. 6, denying the execution of the contract, which is the foundation of the suit, is as follows: "The defendant for further answer to the complaint says that the alleged agreement upon which the action is founded, was not executed by defendant or by any one authorized to bind defendant in the premises, and defendant causes affidavit to be made by its authorized agent, that this plea is true." (Record, p. 14).

It is difficult to conceive upon what principle the court

below sustained the demurrer to this plea. By the provisions of the Revised Statutes of the United States, "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding, existing at the time in like causes in courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."—Revised statutes Sec. 914.

The plea No. 6 as above stated, is in the exact form prescribed by the Code of Alabama and is without doubt sufficient.—Code of 1876 of Alabama Sec. 3010. The same form is still in force.—Code of 1886 p. 796 (33).

NOTE.—Sec. 3010 of the Code of Alabama of 1876 prescribing the form of the plea of non est factum is as follows:

A. B., plaintiff, vs. C. D., defendant, } The defendant, for answer to the complaint, saith that the note (or bond, as the case may be), upon which the action is founded, was not executed by him, or by any one authorized to bind him in the premises; and makes oath that this plea is true. (If filed by an executor or administrator, that he believes it to be true).

E. F., Att'y for def't.

Secretary of the Woodstock Iron Company, and that the corporate seal thereof was attached thereto. 3d, That said plea does not deny that Alfred L. Tyler was the President and Samuel Noble was the Secretary of the Woodstock Iron Company at the time of the execution of said agreement. 4th, That it is not alleged in said plea, that the Woodstock Iron Company, since the execution and delivery of said contract has not ratified and confirmed the same. 5th, That it is not denied by said plea that the Woodstock Iron Company after the execution of said agreement, did not receive and accept and ratify an acceptance of the said agreement by the plaintiff as alleged in the complainant. 6th, That by said plea it is not denied that said defendant caused its corporate seal to be affixed to said agreement. 7th, That by said plea it is not denied that the seal attached to said agreement is the corporate seal of the defendant." (Record p. 20).

cordance with a settled policy to restrain corporations within the limits of the powers expressly granted to them. The Court says: "In such case the doctrine of estoppel can not be held to apply, without clothing corporations with the ability to increase their powers indefinitely by sheer usurpation."—Marions Saving Bank vs. Duncan, 54 Ala. 473; Chambers vs. Falkner, 65 Ala. 448; Grand Lodge of Alabama vs. Waddell, 36 Ala. 318; Ex parte Burnett, 30 Ala. 461; City Council, etc., vs. Plank Road Co., 31 Ala. 76; The City of Eufaula vs. McKnabb, 67 Ala. 588; Central R. R. Co. vs. Smith, 76 Ala. 572; State vs. Stebbins, 1 Stewart, 308.

In passing upon the power of the plaintiff in error to make the contract sued on in this case, it will be necessary

the general government and the courts of the States. This policy is founded in sound sense, and ought not to be disregarded.—Ohio Ins. Co. vs. DeKalb, 16 Howard (U. S.), 431; Cristy vs. Pridgeon, 4 Wallace (U. S.), 196.

NON EST FACTUM.

Plea No. 6, denying the execution of the contract, which is the foundation of the suit, is as follows: "The defendant for further answer to the complaint says that the alleged agreement upon which the action is founded, was not executed by defendant or by any one authorized to bind defendant in the premises, and defendant causes affidavit to be made by its authorized agent, that this plea is true." (Record, p. 14).

It is difficult to conceive upon what principle the court

below sustained the demurrer to this plea. By the provisions of the Revised Statutes of the United States, "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding, existing at the time in like causes in courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."—Revised statutes Sec. 914.

The plea No. 6 as above stated, is in the exact form prescribed by the Code of Alabama and is without doubt sufficient.—Code of 1876 of Alabama Sec. 3010. The same form is still in force.—Code of 1886 p. 796 (33).

Section 2979 of the Code of Alabama of 1876, which is now section 2665 of the Code of 1886, expressly provides, that "any pleading which conforms substantially to the schedule of forms in this Code is sufficient." And see Pool vs. Minge 50 Ala. 100; Munter & Fabor vs. Rogers Ib. 283. Independent of the statute however the plea is good at common law.—3 Chittys Pleadings p. 1001 and 951, 9th Amer. Ed.

The grounds of demurrer assigned to this plea are as follows: "1st, That said plea asserts a conclusion of law. 2d, That said plea does not deny that said agreement was executed by Alfred L Tyler, President, and Samuel Noble, Secretary of the Woodstock Iron Company, and that the corporate seal thereof was attached thereto. 3d, That said plea does not deny that Alfred L. Tyler was the President and Samuel Noble was the Secretary of the Woodstock Iron Company at the time of the execution of said agreement. 4th, That it is not alleged in said plea, that the Woodstock Iron Company, since the execution and delivery of said contract has not ratified and confirmed the same. 5th, That it is not denied by said plea that the Woodstock Iron Company after the execution of said agreement, did not receive and accept and ratify an acceptance of the said agreement by the plaintiff as alleged in the complainant. 6th, That by said plea it is not denied that said defendant caused its corporate seal to be affixed to said agreement. 7th, That by said plea it is not denied that the seal attached to said agreement is the corporate seal of the defendant." (Record p. 20).

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below sustained the demurrer to this plea. By the provisions of the Revised Statutes of the United States, "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding, existing at the time in like causes in courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."—Revised statutes Sec. 914.

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It will be seen upon the reading, that each of the assignments of demurrer are entirely without merit, if not frivolous. The demurrer is supposed to admit the allegations of the plea which states distinctly *that the alleged agreement was not executed by defendant or by any one authorized to bind defendant in the premises.* So far as the question of ratification attempted to be raised by the demurrer is concerned, that is a matter of evidence, and it has never been considered necessary or proper to set out in pleading the evidence by which it is expected to prove or disprove the plea.

It has been argued, that the affidavit to the plea is insufficient. The affidavit is as follows:

State of Alabama, Jefferson County:

Before me, A. W. McCullough, Clerk of the Circuit Court of the United States for the Northern District of Alabama, personally appeared William Noble, agent of the Woodstock Iron Company, defendant in the above entitled cause, and being duly sworn deposes and says that the statements of the foregoing pleas are true.

(Signed) WILLIAM NOBLE.

Sworn to and subscribed before me this 6th day of March, A. D. 1885. (Signed) A. W. McCULLOUGH, Clerk.

The affidavit, it is submitted, is sufficient, but if it were not it could not avail the defendant on the demurrer, as no objection is made to the plea on that account. Section 3005 of the Code of Alabama of 1876, which is now section 2690 of the Code of 1886, is as follows: "No demurrer in pleading can be allowed but to matter of substance, which the party demurring specifies; and no objection can be taken or allowed which is not distinctly stated in the demurrer." This statute has been construed in the following cases: Burns vs. Mayor 34 Ala. 485; Helvenstein vs. Higginson 35 Ala. 259; Robbins vs. Mendenhal Ib. 722; Pomeroy vs. State 40 Ala. 63; Ala. & Fla. R. R. Co. vs. Watson 42 Ala. 75; State vs. Gardner 45 Ala. 47; Donegan vs. Wood 49 Ala. 242; Courts vs. Happle Ib. 254; Eads vs. Murphy 52 Ala. 520; Daniels vs. Hamilton Ib. 105; Masterson vs. Gibson 56 Ala. 56; Troy vs. Coleman 58 Ala. 570; Brewer vs. Watson 65 Ala. 88; M. M R. R. Co. vs. Crewshaw Ib. 567; Grimmet vs. Henderson 66 Ala. 521; Williams vs. Bowdin 68 Ala. 126; Cotton vs. Ruttledge 33 Ala. 110; Henly vs. Bush 33 Ala. 636; Elliot vs. Halbrook Ib. 659.

John B. Knox
for Plaintiff in Error

FEB 1 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

No. 180.

THL WOODSTOCK IRON COMPANY

vs.

THE RICHMOND AND DANVILLE EXTENSION COMPANY.

Supplemental Brief of John B. Knox, for the Plaintiff in Error.

JOHN B. KNOX,
Attorney for Plaintiff in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

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1. It is argued that the Plaintiff in Error could have shown the illegality of the contract under the *general issue*, and that the action of the court in sustaining the demurrrer, to the *special pleas*, interposing this defense, was at most error without injury.

If this was true, as to the special pleas, it would not affect the case, as the defense of illegality is sufficiently raised by the demurrer to the complaint. The demurrer to the complaint presented distinctly this defense (Record, p. 11), and was overruled in the court below, (Record, p. 14); the action of the Court in overruling this demurrer is one of the assignments of error here. (Record, p. 22.)

The allegations of the complaint, if susceptible of more than one construction, when assailed on demurrer, that construction must be adopted which is least favorable to the pleader. See, on this point, *Jones* ys. *McPhillips*, 77 Ala., 314.

But we do not concede that the defense could properly have been made under the *general issue.* Section 2988 of the Code of Alabama of 1876, in force when this case was tried, contains this language:

"In all suits where the defendant relies on a denial of the cause of action, *as set forth by the plaintiff*, he may plead the general issue, and in all other cases the defendant must briefly plead specially the matter of defense, and may, by leave of the Court plead more pleas than one."

The object and plain meaning of this statute would seem to be, to limit some what the scope of the plea of the general issue at common law. By the express terms of the statute, the defendant is confined to a denial of the cause of action *as set forth by the plaintiff*, which is equivalent to the *general denial* under the New York code. The

difference in the scope of this plea, and the general issue at common law is apparent. The former is merely a denial of the particular facts alleged in the complaint, whereas, the latter is supposed to include everything which disproves a subsisting legal liability. Gould's Pleading, p. 304, note 6; 10 Barb., 321; 31 Barb., 100; 12 Barb., 601; 15 How. Pr. Rep., 29; 2 Kern., 15; 16 N. Y. Rep., 297.

This seems to be the construction given to the statute by the Supreme Court of Alabama. In *Brewer* vs. *Strong's Ex'rs.*, (10 Ala., 965,) the Court say:

"Where the defendant pleads the general issue, he admits for the purposes of the trial, that the declaration discloses a good cause of action; and when, upon this state of pleadings, the plaintiff proves what he has undertaken to do, he is entitled to a verdict, although the Court may afterwards arrest the judgment for defectiveness of the declaration."

In *Slaughter* vs. *Doe, &c. Swift et al.*, (67 Ala., 498.) this language is used:

"Our statute has defined the extent to which the plea of not guilty can be made available. Its language is, 'In all suits where the defendant relies on a denial of the cause of action, as set forth by the plaintiff, he may plead the general issue; and in all other cases the defendant must briefly plead specially the matter of defense, and may by leave of the Court, plead more pleas than one.'"

In *Petty* vs. *Dill* (53 Ala. 645), the same Court say:

"The plea (the general issue) is a mere general denial of the allegations of the complaint, without averring any special matter of defense. It casts on the plaintiff the onus of proving every material allegation of the complaint; it *limited* the defence to evidence in disproof of them."

In *Howland* vs. *Wallace*, (81 Ala., 239) this Court again say:

"The case was tried on the single defense of the general issue. That plea put in issue the material allegationsof the complaint; and it did no more. Any defense, special in its nature, or reaching beyond such *mere denial*, the statute requires to be specially pleaded."

If this be the correct construction of the statute, it follows that the defense of illegality could not properly be made under the general issue as limited in Alabama. Of course, if the illegality appeared upon the face of the contract, it could have been presented by this plea; but, in that case, it could have been made as well, and was made, by the demurrer to the complaint. The defense was renewed, in the pleas in order that the question might be before the court in every aspect.

In *Atchison, &c , R. R. Co.* vs. *Miller*, (18 Am. & Eng. R. R. Cas. 546), the rule is thus stated:

"If, in an action upon a contract, fair and legal upon its face, it is claimed by the defendant that

the contract is void as being illegal and against public policy, such illegality must be pleaded, or it will be disregarded by the court in which such action is pending."

Where the scope of the plea of the general issue is limited, as it is in Alabama, Mr. Chitty, and all the authorities, hold that the defense of illegality must be specially pleaded.—Chitty on Plead., pp. 507 and 511, 16 Am. Ed; *Bradford* vs. *Daniel*, 65 Ala., 133; *Munter & Faber* vs. *Linn*, 61 Ala., 492; *Dickson* vs. *Burk*, 6 Ark., 412; *Stannard* vs. *McCarty*, 1 Morris, (Iowa), 124; *Houston* vs. *Williams*, 3 Blackf. (Ind.), 170; *Suit* vs. *Woodhall*, 116 Mass., 547; *Cummings* vs. *Barkalow*, 4 Keys, (N. Y.), 514; S. C., 1 Abb. App. Dec., 479.; *U S.* vs. *Sawyer*, 1 Gall. C. C., 87; *Chambers* vs. *James*, 2 Greene, (Iowa), 320; *Bradford* vs. *Tinkham*, 6 Gray, 494; *Sibby* vs. *Downey*, 5 Allen, 299.

But even if it were conceded, that the defense of illegality might have been made under the plea of the general issue, it does not appear that it *was* made, on the contrary after the court had twice decided that the contract as stated was not illegal, it cannot be supposed, that, in the face of these rulings, the defendant again interposed the defense, under the general issue. Especially is this so, when the record fails to show that any further defense was made in the case.

It is manifest, from the record, that the merits of the case were considered as having been decided,

so far as the lower court is concerned, when the demurrers to the complaint were overruled, and the demurrers to the pleas of *non est factum*, *ultra vires*, and illegality were sustained.

It is settled, in Alabama, and by the decisions of this Court, that where the court improperly sustained a demurrer to a special plea, it is error without injury, when it *affirmatively* appears that the defendant had the benefit of the defense under the general issue. In each of the cases, where this doctrine has been applied, it did *affirmatively* appear, that the defendant had the benefit of the defense interposed by the special plea, under the general issue, and the decisions are placed upon that ground. *Chambers County* vs. *Clews*, 21 Wall., 317; *Montgomery & Eufaula R. R. Co.* vs. *Chambers et al.* 79 Ala., 338; *Oliver* vs. *Alabama Life Ins. Co.*, 82 Ala., 417; *Pollok* vs. *Brush Electric Ass.*, October Term, 1888, in manuscript.

On the other hand, where a demurrer has been improperly sustained to a special plea, the appellate court will reverse, unless it affirmatively appears that defendant suffered no injury from such erroneous ruling.

In *Pinkston and wife* vs. *Green and wife* (9 Ala., 23) the Court say:

"It is further contended, that although the Court erred in sustaining the demurrer to these pleas, this Court will not reverse, because the defendant could have had all the benefit which could have been de-

rived from these pleas, under the seventh plea, and has, therefore, sustained no injury by the erroneous action of the Court. In *McKenzie* vs. *Jackson*, 4 Ala., 430, a party pleaded a special plea, and the general issue. The Court sustained a demurrer to the plea, and this Court refused to reverse, because the matter of the plea could have been, and was in fact, given in evidence under the general issue. In *Rakes, Admr.*, vs. *Pope*, 7 Ala., 161, there was also a special plea and the general issue, and a demurrer improperly sustained to the former. This Court held, that the special plea amounted to the general issue, which being in, it was impossible that the action of the Court, if erroneous, could have prejudiced the defendants, as the plaintiff was compelled to make the same proof to sustain his action under the one plea as under the other. In both of these cases it was, therefore, *impossible* that any injury could have accrued to the party against whom the error was committed, and that must be the state of things before this Court can undertake to say that an error of the Court below has done the party against whom it was committed no injury. In this case we cannot say that no injury has accrued from the supression of these pleas."

In *Falls* vs. *Weisinger* (11 Ala. 806), this language is used :

"It is, however, contended, for the defendant in error that, although the demurrer to the pleas should not have been sustained, yet, as the defendant below might have proved the same fact which they set up, under the other pleas, he has not been prejudiced by the judgment on demurrer; and therefore cannot complain of the decision against him. * * Now, although it may be that the plea

of performance would have tolerated the admission of all the facts alleged in the several pleas, yet, we must intend, under the circumstances of the case, that the demurrer was sustained, because it was supposed that the pleas adjudged bad, did not present au available defense, and that the court would not have admitted evidence of the facts they allege." * * It remains but to add that the judgment is reversed and the cause remanded."

When error is shown, the presumption of injury arises, and must be clearly repelled by the record, or the judgment will be reversed. In other words, the rule is to reverse where error is shown, unless it affirmatively appears no injury resulted from the error. *Leslie* vs. *Sims*, 39 Ala., 161 ; *Moody* vs. *McCowan*, Ib., 586 ; *Foster* vs. *State*, Ib., 229 ; *Buford* vs. *Gould*, 35 Ala., 265; *Rigby* vs. *Norwood*, 34 Ala., 129; *Raines* vs. *Raines*, 30 Ala., 425 ; *Sachett & Shelton* vs. *McCord*, 23 Ala., 851 ; *Long* vs. *Rogers*, 17 Ala., 540 ; *Robinson* vs. *Allen*, 16 Ala., 106 ; *Hagarty* vs. *Bradford*, 9 Ala,, 567 ; *Castillo* vs. *Thompson*, Ib., 937 ; *Morrison* vs. *Judge*, 14 Ala., 182 ; *Lawson* vs. *Orear*, 7 Ala., 784 ; *Dave* vs. *State*, 22 Ala., 23 ; *Davis* vs. *State*, 17 Ala., 415.

II. The same rules here contended for, apply to the rulings of the court upon the other special pleas.

III. It is further argued that no sufficient exception was reserved to the judgment of the court in sustaining the demurrer to the plea.

It is a sufficient answer to this, that no exception is necessary in such case. Where the ruling of the court appears of record, it is reviewable by writ of error, and no exception is necessary.

In *Petty* vs. *Dill*, (53 Ala., 644., the court say:

"No exception is necessary to such ruling; it appears of record, otherwise, necessarily, if the record is properly made up, which it is the interest of each party and the duty of the court to see done."

IV. It is argued that, although the Woodstock Iron Company had no power under its charter to make the contract in controversy, that certain acts of the legislature, passed subsequently, gave it such power.

If examined, it will be seen that these statutes expressly confined such powers as are there given to corporations organized under the provisions of those acts, and have no effect upon the charter powers of the plaintiff in error.—Acts of Ala. 1875-6, p. 244, 248; Acts of Ala., 1878-9, p. 67,-9; Acts of Ala., 1880-81, p. 40.

V. In the cases cited by the counsel for defendant in error, *Wilks* vs. *Georgia Pacific R. R. Co.* (79 Ala. 180) and *Rives* vs. *M. P. R. Co.*, (30 Ala., 92), the Supreme Court of Alabama did not consider or pass upon the questions of public policy involved in contracts to influence the location of a railroad. The point was not raised at all in either of the cases. In the Wilks case the contract was held to be *ultra vires* and the case

went off on that point. Besides, a careful examination of this case will show that no stipulation was made as to the adoption of any particular route, but the contract was made to encourage the building or extension of the road, and no question of public policy was invloved.

It is not necessary that we should controvert the proposition stated by Mr. Greenhood, in his work on Public Policy, and cited by opposing counsel.

The same author sustains the principle for which we contend in this case, and cites approvingly the cases upon which we rely. (See pp 319-321)

The contract in this case was not made with the railroad company, but with the construction company, who was employed to locate and build the road, and made to influence the location of the road.

No case has been cited that sustains such a contract, and it is believed that nonee can be found. The authorities are uniform in condemning such contracts, as contrary to public policy and good morals.

JOHN B. KNOX,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

No. 180.

THE WOODSTOCK IRON COMPANY, Plaintiff in Error,

vs.

RICHMOND & DANVILLE EXTENSION CO., Defendant in Error.

Brief and Argument of H. C. Tompkins, Attorney for Defendant in Error.

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Brief and Argument of H. C. Tompkins, Attorney for Defendant in Error.

The declaration or complaint filed in the court below contains two counts. The second count sets out the agreement which is the foundation of the action and is more specific in its allegations than the first. The only assignment of error bringing up the sufficiency of the complaint is upon the ruling of the court below in overruling the demurrer filed to the complaint as a whole.

The agreement was made on the 18th day of November, 1881. It was in the shape of a proposition made by plaintiff in error by its president and secretary and attested by its corporate seal. The proposition was accepted by the defendant in error.

By this instrument the Woodstock Company proposed to the Extension Company that if it would locate and construct or cause to be located and constructed the railroad of the Georgia Pacific Railroad Company, or of a new company then being formed to be called the Georgia Pacific Railway

Company, by way of the town of Anniston, then the Woodstock Company would donate and convey or cause to be donated and conveyed by good and sufficient deeds, to the Extension Company or as it might direct:

1st. A right of way over and through all the lands it then owned or might thereafter acquire, one hundred feet wide on the line of the location outside the corporate limits of the town.

2d. Strips or parcels of land through the town varying in width from fifty to an hundred and fifty feet.

3d. Such additional strips or parcels of land for such sidings and spare tracks as might be needed for convenient approach to the furnaces and other manufactures and for the business of the railroad.

It was further proposed or agreed in the instrument if the road was constructed through the town, the Woodstock Company would pay to the Extension Company, or as it might direct, the cash sum of thirty thousand dollars to be paid, half upon the road's making connection with one named road, and the other half upon its making connection with another named road.

The complaint further averred that at the time this proposition was made and accepted the Woodstock Company was engaged in the business of making and selling pig metal and other products from iron ores; that its works were located in the town of Anniston, and that it owned a large quantity of valuable property in such town, and that the road referred to in said agreement was then in process of construction from Atlanta, Georgia, through the State of Alabama to Columbus, Mississippi.

It was further averred that the Extension Company had located and constructed the railroad through the town of Anniston, and had made the connections specified, and all within the time specified, and had in everything fully executed its part of the agreement.

It was then averred that the Woodstock Company had partially performed, that it had pursuant to the agreement

donated and conveyed to the Georgia Pacific Railway Co., at the request by the Extension Company, the several parcels of land mentioned in the agreement, and had paid on the cash donation the sum of $6,325.00 in cars furnished the railway company on account of said cash payment at the request of the Extension Company. The action was for the difference and interest. The demurrer to the complaint raises but a single question—whether the agreement set out therein is void because of being against public policy. We will not discuss the demurrer, as the same question is presented by pleas numbered 9, 10 and 11, to which defendant in error demurred, and the whole question will be argued when we come to discuss the ruling of the court on those demurrers.

The plaintiff in error filed eleven pleas; the first, denied the corporate existence of defendant in error; the second, was the plea of the general issue; the sixth, was a sworn plea denying that the contract sued on was executed by defendant or by any one authorized to bind defendant in the premises; the third plea set up that the plaintiff in error was a corporation organized under the general incorporation laws of Alabama in 1872, that the object of the corporation, as set out in its declaration, was "the manufacturing of pig metal and other products of iron ore and making sale thereof, connecting with said business all such operations as are usual and incidental thereto. The plea then averred that the company had under its charter no authority to make the contract sued on; the 5th, 6th and 7th pleas allege generally conclusions of law and not facts, and even had they been properly drawn would raise no other questions than those raised by the other pleas. The 9th, 10th and 11th pleas allege in substance, in addition to the facts set up in the complaint, that the Extension Company was employed by the Railway Company to build the road at a certain sum per mile; that the two were distinct corporations; that John W. Johnston, who represented the former company in negotiating the contract sued on, was an officer, director

and stockholder in that and in the Railway Company ; that the town of Anniston was not on the line of the nearest, shortest and cheapest route for the road to be built, and therefore by making the contract it was agreed to deflect the road from the proper route. The 11th plea alleges also that Johnston stated to the Woodstock Company that he could control the location of the road, and threatened, if it would not agree to make the donations set out in the agreement, that he would have it carried by a rival town within three miles of Anniston, and that the agreement to pay the money and convey the lands, which it is averred were worth twenty thousand dollars, was procured by these threats.

FIRST.

The demurrers to the plea setting up that the contract was *ultra vires*, and to those setting up the alleged invalidity of the contract because against public policy, are full, and raise every question that could be raised against those defenses.

It is a sufficient answer to the assignment of errors on the rulings of the court below on the demurrers to the several pleas to say that if there was error, it was error without injury. The facts alleged in the pleas setting up the invalidity of the contract ; one set because it was *ultra vires* and the other set because it was against public policy, went to the inception of the instrument sued on, they in effect denied the legal existence of any such contract, for if void in its inception it was in law no contract. Any fact going to show that a contract sued on never had a legal existence might as well be introduced in evidence under the plea of the general issue as under a special plea. So with the sixth plea, it did not deny that the person whom it was averred signed the agreement, did sign it, but simply denied their authority to do so. This court has expressly decided that an erroneous ruling in such a case as is here presented, is no ground for reversal.

Chambers county vs. Clews, 21 Wall, 317.

Pollak vs. Brush Electric Association, October Term, 1888 in manuscript. See, also, as sustaining the position contended for above.

Railroad Co. vs. Bank of Ashland, 12 Wall, 226.
Hanrick vs. Andrews, 9 Porter 9.
Pitman vs. Kintner, 5 Blackford, 250.
Rodgers vs. Brazeale, 34 Ala. on p 515.
Craig v. Missouri, 4 Pet. 410.
Mason v. Elred, 6 Wal. 231.
Ins. Co. v. Harris, 97 U. S. 331.

SECOND.

But we respectfully insist that the contract set out in the complaint was not *ultra vires*, and for two reasons:

1st. The plaintiff in error was a corporation formed for the purpose of making and selling products of iron ore. By the contract sued on it did not undertake to carry on any other business; it was not contemplated by the contract that the company should own and operate a railroad; it is not its object to extend or increase the powers beyond those given by the charter, but it is apparent that the object and purpose of the contract was to obtain the construction of a railroad to the town of Anniston where the furnaces of plaintiff in error were located and thereby to obtain greater facilities for transporting the material to be used in manufacturing their products and in conveying such products to the markets of the world. We cannot believe that the narrow views of the powers of corporations insisted on in the brief of counsel for plaintiff in error will be sustained by any court; certainly we think we can say that they are not sustained by law writers or courts that have heretofore spoken on the question. Here is a corporation organized to make pig metal and to sell. The court must judicially know that to carry on the business, it is necessary to transport to the furnaces large quantities of ore, rock, coal and other articles used in making ~~each~~ such metal and that to sell the product it is necessary to get it to

the markets of the world. To say that such a corporation has not the power to contract for a means of transportation would be in many instances to deny it the power of carrying on its business. We concede that a contract by which a corporation, with the powers belonging to this one, might undertake to own and operate a railroad might be *ultra vires*, but that is a very different thing from a contract, by which it obtains increased transportation facilities, betters its situation in respect to one of the essentials for the successful conduct of its business, for it is apparent that nothing would more greatly tend to increase the profits of such a business than obtaining the benefits of competition in transportation. In Alabama Gold Life Insurance Co. vs. The Central, &c., Association, 54 Alabama, 77, in speaking of the powers of corporations generally, the Court says: "It must not be understood, however, that the charter, * * * must expressly confer the power of making contracts. As we have said, the capacity to contract is an incidental corporate power,and if the law is * * * silent as to the contracts into which a corporation may enter, it has the power to make all such as are necessary and proper to enable it to accomplish the purposes of its creation."

And in the same case the Court, referring to the same general law under which the plaintiff in error was organized, say:

"This is the theory on which the general statutes for the "organization of private corporations proceed, for though "the powers of such corporations are enumerated, that of making contracts is not included, but it is left to implica- "tion from the powers mentioned and the character and "purposes of the corporation."

So Mr. Pierce, in his work on Railroads, uses this language.

"The power of corporations in respect to contracts and "business dealings, extends not merely to those which are "absolutely essential or indispensable to the performance "of the specified acts authorized by its charter, but as

"well to those, which not being prohibited by statute or "public policy are designed and may be useful to promote "the main enterprise. The choice of means which are rea- "sonably promotive of the main purpose is with the corpo- "ration, and where different methods stand this test, judi- "cial tribunals will not revise its discretion by holding that "the one chosen was not indispensable and another might "have been more wisely taken."

So in Green's Brice's *Ultra Vires* 89, it is said "corporators "may transact in addition to their main undertaking, all "such subordinate and connected matters as are, if not es- "sential, at least very convenient to the due prosecution of "the former;" and again, "they are in a manner necessita- "ted to engage in business, which is not within the mere let- "ter of their constitution."

Upon these principles it has been held that a corporation created for the purpose of mining and transporting coal, had the power to purchase a steamboat to convey the coal to market.

Calloway, M. & M. Co. vs. Clark, 32 Mo. 305.

That one created for the purpose of raising and smelting lead ore was authorized to enter into a contract providing means for transporting the smelted ores to market.

Mars vs. Averell, 10 N. Y. 455.

Here we say there was no effort to engage in another business, only a contract by which increased facilities were given to the corporation by providing a means of transporting the raw material to its works and its products to the markets. The question here is not one of abuse of powers by the officers of a corporation, but one as to the right to exercise the power at all. It may seem unwarranted extravagance to spend so much money in procuring the additional transportation facilities, that would depend upon the extent of the business of the company, of which the pleadings tell us nothing, but such a contract would not be void if the power exists to make any contract of the character. It might be an abuse, but not a usurpation of pow-

er, and courts have no power as said above to "revise its — (the corporation's) discretion by holding that the contract made was not indispensable and another course might have been more wisely taken." The rule is also well settled 'that corpora tions are bound by contracts duly entered into "by their directors, for purposes which they have treated "as within the objects of their acts and which cannot be "clearly shown not to fall within them."

Shrewsbury &c., Ry. Co. vs. North Western &c., Ry. Co., 6 H. L. Ca., 113, 124.

Green's Brice's *Ultra Vires*, p. 38 and n. a.

Watt's Appeal, 78 Penn. St. 370, 292.

1 Waterman on Corporations 598-600.

Whitman Gold Mining &c., Co. vs. Baker, 3d Nevada 386.

1 Morawetz on Corporations, § 362-4.

Bank vs. Flour Co. 41 Ohio St., 552.

Bradley vs. Ballard, 55 Ill. 413.

The Madison &c. Co., vs. Watertown &c. Co. 5 Wis. 173.

Wheeler vs. R. R. Co. 31 California, 46.

South Wales Ry. Co. vs. Redmond 10 C. B. N. S. 674.

Hill vs. Nisbet, 100 Ind. 341.

Ellis vs. Howe Machine Co., 9 Daly, 78.

1 Morawetz on Corporations, § 320.

Clarke v. Im. Gas Co., 4 B. & Ad. 315.

2d. Whatever may have been the powers of such corporations at the time plaintiff in error was organized, we respectfully submit that under the laws of Alabama at the time this contract was made such corporations were expressly authorized to enter into such a contract. The *theory* upon which the refusal ofcourts to enforce contracts *ultra vires* is based, rests upon the idea, that it is against public policy to permit corporations to usurp to themselves powers not given by the sovereign, being organized to do certain things, they should not be permitted to do others. It is perfectly clear that at the time the contract here involved was entered into, corporations organized for mining and manufacturing here, expressly authorized to build and

operate railroads. In 1876 the general laws authorizing the formation of corporations for mining and manufacturing were revised, and by section 15 of the act they were expressly authorized to construct and operate a railroad for their own uses and purposes to and from their works or place of business to connect with some navigable stream or with some existing railroad, * * * not to exceed ten miles in length."

Pamphlet Acts 1875-6, p 244, 248.

This act was amended in some particulars in 1879, and in 1881 it was further amended by increasing the length to which such a road might be operated by such corporations to twenty miles. These acts give to the corporations for the purpose of constructing such roads the right to condemn land, and the amendments struck out the limitations contained in the original act, limiting the power to build—only for the uses and purposes of the corporation.

Pamphlet Acts of 1878-9 p. 67-8.

Pamphlet Acts of 1880-81 p. 40.

So far from its being against the policy of the State to permit mining and manufacturing corporations to engage in the business of owning and operating railroads, we find its declared policy was the reverse, as shown by its legislation. It is true that the first act says that corporations organized under its provisions shall have these powers, but there is no reason why it should be held that corporations organized under the general laws of the State prior to the passage of that act would be violating the policy of the State by doing that which the corporations organized under the revised general laws were expressly authorized to do. Having the power to build and operate a railroad of its own, to and from its works the corporation would be authorized to make a contract whereby it agreed to pay a sum of money to another for bringing a railroad by its works.

Green Bay &c. R. R. Co., vs. Union &c., Co., 107 U. S. 98.

Shawmut Bank, vs. P. & M. R. R. Co., 31 Vt. 491.

But even if the contract was *ultra vires*, having been fully executed by the defendant in error and partially by the plaintiff in error, the latter was estopped from setting up the defense after receiving all of the benefits arising from the contract. Especially should that be so in a case like the one at bar. Here the work was done and could not be undone. It was impossible to put the defendant in error in the position it occupied before it had performed its part of the agreement, and it would be most inequitable and unjust to permit the plaintiff in error, after getting the benefit of the contract in the increased facilities it obtained for getting its products to market and for supplying its furnaces with material to work upon, to repudiate that contract through which it had obtained these great benefits. Whatever may be the rule declared by the courts of Alabama, this court and the courts of the other States of the Union have, almost without exception, held that in such a case the parties are estopped from setting up the defense. In the case of the State Board of Agriculture v. the Citizens' Street Railway Co., 47 Ind. 407, the identical question here presented was before the Supreme Court of Indiana. The plaintiff was a corporation under whose control the State fairs were held. It owned grounds near a terminus of the street railroad owned and operated by defendant. Defendant had no power under its charter, except to own and operate a street railroad. It made a contract by which, as an inducement to get plaintiff to hold its fairs on the grounds near its terminus, it agreed to pay it a sum of money, one thousand dollars. The suit was brought to collect this sum of money, and defendant pleaded that under its charter it had no authority to make such a contract, but the court held that the plaintiff, having fully performed its part of the contract, defendant was estopped from denying its power to make the contract. This case has been expressly approved by this court in the case of Hitchcock v. Galveston, 96 U. S. 341.

The Whitney Arms Co. v. Barlow *et al*, 63 N. Y. 62, was a suit brought to collect a claim for "railroad locks" sold by

the plaintiff to the corporation whom defendants represented. The Court of Appeals of New York held that the making and vending of such locks was not within the purposes for which the plaintiff was chartered, nor was it incidental to any power which it was authorized to exercise, but it further held that the contract having been fully executed by the plaintiff, defendant was estopped from setting up the defense. The authorities sustaining this view are numerous and meet the approval of the best text writers, and in no court is the doctrine more strongly declared than in this. The sovereign alone can object.

Thomas v. Railroad Co., 101 U. S. on p. 85–6.
National Bank v. Matthews, 98 U. S. 621.
Rider Raft Co. v. Roach, 97 N. Y. 378.
C. & A. R'y Co. v. Derkes, 103 Ind. 520.
Ward v. Johnson, 95 Ill. 215.
Darst v. Gale, 83 Ill. 136.
Oil Creek, &c., R. R. Co. v. Penn. Trans. Co., 83 Penn. St. 160.
C. & A. R. R. Co. v. May's Landing R. R. Co., 48 N. J. L. 530.
Wright v. Pipe Line, 101 Penn. St. 204.
Memphis & L. R. R. Co. v. Daw, 19 Fed. R. 388.
Bissell v. Mich. So., &c., R. R. Co. 22 N. Y. 258.
Parish v. Wheeler, Ib. 494.
Sturgeon v. Board of Com., 65 Ind. 302.
Green's Brice's Ultra Vires, p. 729, note a.
2 Morawetz on Corporations, § 689–696.

The pleas contain no averment that the contract was made without the consent of the stockholders, nor is there any pretense that the ~~directors~~ officers were unauthorized to sign the particular contract. The defense is that the corporation was not authorized to enter into the contract even though all interested consented thereto. We insist the act would not be void in such a case, though it might be *ultra vires*.

The defense is one that courts do not and should not favor. Even the English courts have often questioned the

policy and morality of permitting it to be interposed. It has been called by one of the English judges an "indecent" defense, by another a "dishonest" defense, and Lord St. Leonard in Hawkes v. Eastern Counties R. R. Co., 5 H. L. Cases, 331, said, "The safety of men in their daily contracts "requires that this doctrine of *ultra vires* should be con- "fined within narrow bounds."

We again repeat that this is not a case of a corporation undertaking to engage in a business not authorized by its charter. A corporation may, with the consent of its stockholders, and it is not denied in this case, that such consent was given; on the contrary, the partial execution of the contract which is alleged in the complaint and not denied by the pleas, would indicate that they did consent, might give away all of its property, and such gift must be good against every one except its creditors. We must not lose sight of the fact that upon these pleas, all inferences being against the pleader, we must presume this contract was made with the approval of all shareholders. If the stockholders assented to the act they could not even charge the directors with a misappropriation of the funds, *a fortiori* they cannot, after a third party has carried out in good faith his part of the contract, repudiate the liability of the corporation thereon.

Sheldon v. Eickemeyer, &c., Co., 90 N. Y. 607.
Stewart v. Erie, &c., Trans. Co., 17 Minn. 372.
Watt's Appeal, 78 Penn. St. 370.
2 Morawetz on Cor., § 625.
Railroad Co. v. Howard, 7 Wall. 392.

Counsel for plaintiff in error in his brief filed in this case concedes that the weight of authority sustains the position taken by us as to the estoppel against setting up the defense of *ultra vires* in such a case, but says in passing upon the power of plaintiff in error to make the particular contract this court will have to construe the statutes under which the corporation was created. We concede it. In determining whether any corporation has or has not the pow-

er to do a particular act, the statute creating it must be looked to, but it by no means follows that because that is the case that a statute has to be construed in determining the effect of that act, or whether under certain given circumstances the corporation is or is not estopped from setting up the defense that it was *ultra vires*.

We look to the statutes of Alabama to determine whether this contract was within the powers of the corporation. Concede that we decide that it was not, what then? The next thing for decision is what is the effect where the plaintiff has fully executed its part of the contract. When we come to determine this we are not guided by any statute; there is no statute on the subject. It is true that the Supreme Court of Alabama have in several cases held that such a contract was void and that the party contracting was not estopped from pleading its invalidity, although the corporation had fully performed its part of the contract, but these decisions are not based upon any statute, the construction of no statute was involved in them, but they are based upon what that court holds to be the general principle of the common law governing such cases. Every case cited on the brief of counsel is based on the common law and not on any statute. As said above, we look to the statute to determine the powers, but not the effect of exceeding them. Then, this being the case, this Court is not bound by the decisions of the Supreme Court of Alabama on this point, for as it has said, "It is only decisions upon local questions," those "which are peculiar to the sev-"eral states, or adjudications upon the meaning of the con-"stitution or statutes of a state which the Federal Courts "adopt as rules for their own judgment."

Olcott vs. The Supervisors, 16 Wall. 678.

In Oates vs. National Bank, 100 U. S. 239, two questions were involved—1st, Whether the paper sued on was commercial paper; and 2d, if so, was the plaintiff who had taken collateral security for a pre-existing debt, a *bona fide* purchaser. In determining the first question this

court recognized that as the statute declared what should and what should not be commercial paper in determining that question, it was bound by the decisions of the State Court, but in determining the other question, it being a matter of general law, it was not bound by those decisions, and considering the weight of authority against the rule as declared by the Alabama Court, it decided directly contrary to that rule. That this court will not be bound by the decisions of the State Courts on questions of general law is now well settled.

Russell vs. Southard, 12 Howard, on p. 147-8.
Neves vs. Scott, 13 Howard, 268.
Boyce vs. Tabb, 18 Wall, 546.
Burgess vs. Seligman, 107 U. S. 20.

THIRD.

It is next insisted that the contract sued on is against public policy and therefore void. The grounds of this contention are two-fold.

1st. Because it is a contract to pay ~~a railroad company~~ money and donate its property in consideration of ~~its~~ being built by a certain place.

2d. Because the defendant in error was under a contract to build the road of the Georgia Pacific Railway Co. at a stated price per mile and could not contract for a consideration to be received by it to build the road by any other than the shortest and most direct route, especially since Johnston, who signed the contract for it and was an officer and director of the corporation, was also an officer and director of the Railway Company.

1st. If this contract to locate the road on a particular route violates public policy, it must be the public policy of the State of Alabama, for it certainly offends no rule of the public policy of the general government. To determine whether it offends the public policy of the State, we must look to its decisions and statutes if there are any. It seems to be the idea of counsel for plaintiff in error that the pub-

lic policy of the State would forbid a railroad company being influenced to locate its route by a money consideration. The general incorporation laws of the State under which the Georgia Pacific R'y Co. was organized, left the company absolutely free to select its route. In the declaration for a charter the declarants were only required to state "The terminal and such other points along the line of the proposed railroad as they may deem proper."

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Wilks vs. Georgia Pacific Railway Co., 79 Ala. 180.

The fact is the principle contended for by counsel for plaintiff in error is directly opposed to the policy that has prevailed generally in this country. The laws authorizing towns and counties to subscribe to railroads which have been so generally of force throughout the country, all provided that the subscriptions might be conditional on the roads being located to or through a certain place. The true rule on this subject is the one declared by Mr. Greenhood in his excellent work on Public Policy ; on page 321, that author says :

"The manner in which the majority of the railroads of the country have been built is, in all probability, familiar to every one. Men in subscribing to railroads do so out of self-interest. The conditions imposed are made with reference to the enhancement of the value of their own property, or to their personal convenience. Railroads, on the other hand, are in one sense public enterprises ; the corporations constructing them are public agents, becoming, by the exercise of the right of eminent domain, trustees of the public convenience, and obliged to regard that element

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to a high degree in the investment of their capital. It is true such investment is voluntary. They are not often circumscribed in the limits of such investment, in the matter of territory, and when not so limited, they may go where they will. But, being given their rights for public purposes, public benefit must be the "pole star" of their aims. It cannot be said that a subscription to a railroad corporation, conditioned on the location of its route in a particular section or direction, has any tendency to influence the corporation to disregard the public convenience ; for it goes to a place to obtain traffic, and no public policy requires it to select the nearest route it may find. If it does prejudice the public, it is a matter of easy proof. And if such proof can be furnished, any contract of subscription will fall. But in the absence of such proof, *prima facie* any subscription to a railroad corporation, conditional upon its building its line in a particular route, or through a particular town or county, is valid."

And on page 323 the same author in speaking of a case in which a company for a money consideration had changed its route says : "They have the right to locate their line where they will and take advantage of such right to obtain such promises." See also as sustaining the text above quoted :

Cedar Rapids & St. P. R. Co. vs. Spofford, 41 Iowa, 292.
McClure vs. Mo. River &c., R. R. Co. 9 Kansas 373.
C. & A. Ry. Co. vs. Derkes 103, Ind. 520.
Spartanburg & Un. R. R. Co. v. DeGraffenried 12 Rich., L. 675.
McMillan vs. M. & L. R. R. Co., 15 B, Monroe 218.
Rhey vs. E. & S. Plank Road Co. 27 Penn. St. 261.
Jewett vs. L. & N, M. R. R. Co. 10 Ind. 539.
Martin vs. P. & G. R. R. Co. 8 Fla. 370.
Taggart vs. Western Md. R. R. Co. 24 Md. 563, 581-2.
Des Moines Valley R. R. Co. vs. Graff, 27 Iowa, 99.
First National Bank, vs. Hurford, 29 Iowa. 579.
Detroit &c;, R. R. Co. vs. Starnes. 38 Mich. 698.

B. & B. R. R. vs. Brewer, 67 Me. 295.

Cumberland Nalley R. R. Co. vs, Baab. 2 Am. Ry. Cases 187.

Int. & G N. R. R. Co. vs. Dawson, 62 Tex. 260.

Chapman vs. R. R. Co., 6 Ohio, St. 120.

Pixley vs. Gould, 13 Brad, 565.

2 Wood Ry. Law, §267.

2d. The second ground upon which it is insisted the contract is void is because the defendant in error was employed by the Railway Company to construct its track at a fixed sum per mile, one of its directors being also a director in the railway company; therefore it could not contract to increase the number of miles of road to be built and receive a consideration therefor. This is a defense interposed, not by the Railway Company, who was defrauded if any one was, but by the third party with whom the contract was made, and who has received all the benefits accruing from a full performance of its provisions by the Extension Company, and now seeks to repudiate its burdens upon the ground that the Railway Company, who has not complained, might have been wronged by it. The pleas filed by which this defense is interposed do not deny the allegations of the complaint; they admit them. The complaint shows that this third party, which it is supposed may have been defrauded by this contract, had received and accepted all the benefits accruing from a partial performance of the contract on the part of the plaintiff in error. It is alleged in the complaint that it had received deeds to all the lands agreed to be conveyed; the pleas confess this, and allege that the lands were worth twenty thousand dollars; it is also alleged in the complaint and confessed by the pleas, that it had received on the cash donation cars of the value of over six thousand dollars; and these things are alleged to have been conveyed and paid to the Railway Company at the request and by the direction of the Extension Company. We say these allegations are confessed by plaintiff in error; this is clearly so.

The pleas profess to answer the whole complaint; they contain no word of denial of these allegations, and while they set up matters which really traverse the complaint to the extent that they deny the existence of a legal contract, yet they are pleaded in the form of a confession and avoidance, admitting all the allegations of the complaint but setting up these other matters to show that the instrument sued on never had any legal validity; they make a *special issue* devolving upon plaintiff, if they are sufficient in law, to entitle him to recover, only the necessity of proving the one fact denied.

Gould's Pleading, Chap. II, sec. 40.
Toland v. Sprague, 12 Peters, 335–6.
Phillips v. Harris, 3 J. J. Mar. 122.

Then the case may be briefly stated thus: a corporation is formed for the purpose of building a railroad; it may lawfully contract with a person, in consideration of money and lands to be given it, to locate its road by and through a particular place and upon the completion of the work may enforce that contract. Instead of constructing the road itself, it lets out its location and construction to another corporation, and that other corporation, with its full knowledge and consent, does make the contract, which it could lawfully have made, and upon the performance of the contract, a part of the consideration and the only part received at all, is received by the railway company. We must confess that we are at a loss to understand how the third person, who agreed to pay the money in consideration of the particular location of the road, can claim that the contract cannot be enforced because it was a breach of the duty which the company constructing the road owed to the company for whom they were building it. Such a contract can not be said to be against public policy unless we put it upon the ground that a contract to locate a railroad by a particular place in consideration of money or other thing of value, is against public policy. That proposition, we have seen, is against the overwhelming weight of authority, and is cer-

tainly not the law of Alabama, where this contract was made. Then, if there is any illegality attached to this contract it must be because the Extension Company, while acting in a fiduciary character for the railway company, committed a breach of trust by contracting so as to increase the liability of the latter company for a consideration to be received by the former. We do not understand the law to be that such a contract as this is void; at most it is merely voidable at the option of the party wronged, and if done with that party's knowledge and consent it could not be avoided even by it, *a fortio i* it cannot be avoided if the *cestui que trust* participates in the benefits accruing from it. From all that appears from the pleading the donation may have gone as a part payment for building the road. There is certainly no presumption of law that a fraud has been committed. A party relying upon fraud to vitiate a contract must allege facts showing it, and must further exclude the inferences of honest purpose which the law always draws. The distinction between cases of this character and those that offend public policy is very great, though some courts do not seem to have recognized it. Professor Pomeroy, in his Equity Jurisprudence, draws the distinction very clearly; in a note to section 964 he says:

"Thus contracts illegal because opposed to statute or to "public policy or to good morals, cannot be ratified, be- "cause the ratification itself would be equally opposed to "statute, good morals or public policy. Contracts obtained "by actual fraud, by undue influence, by breach of fiduciary "duty and the like may be confirmed, because the parties "alone are concerned, the state or society has no special "interest, as it lies in those opposed to statute, public pol- "icy or good morals."

Here the rules for distinguishing the cases are clearly laid down and the distinction may well be illustrated by the case at bar. If the contract is void, because it offends public policy, it is incapable of having validity given it by anything that might be done. The Railway Company had

a perfect right to make such a contract itself. Suppose defendant in error had transferred its claim to that company and it had sued on it, could payment have been avoided on the ground that the thing which itself could have lawfully done, was rendered illegal when done by its contractor, with its knowledge and consent? The proposition it seems to us, furnishes its own answer. The contract was at most merely voidable, and under the facts shown by the pleading, not even that—at the election of the Railway Company, or it might have come in and claimed the benefit of it, even if voidable at its election, it is not at the instance of the third party.

Twin-Lick Oil Co. v. Marbury, 91 U. S., 587.
Thomas v. Brownsville, &c. R. R. 109 U. S. 522.
Pneumatic Gas Co. v. Berry, 113 U. S. 322.

The fact that Johnston was a director in each of the companies does not change the rule. It is not pretended that he received any other benefit from the contract than that which might accrue to him as a stockholder in common with the other stockholders. The cases cited and referred to by counsel for plaintiff in error and which he seems to think applicable to this case rest altogether upon a principle not in the least analogous to any arising in this case. In each of those cases that are at all supported, either upon reason or by authority, the contract sought to be enforced, was one in which an officer of a railroad company, in consideration of a reward to be paid to him personally, agreed to cause the location of the road to a certain point. In such a case there was a clear sale of one's influence and power in the trust matter---for his private gain. Here a company is employed with full power to locate and construct a road ; with the consent of its employer it agrees to take a certain route, in consideration of which a third party to be benefitted by the change agrees to convey certain lands, and pay certain moneys as the company might direct. From the pleadings it appears that so far as it had directed when the suit was brought, the benefits had all

gone to the employer, and it may be that the employer is entitled to all of the benefits of the contract, can claim the money, but that cannot make the contract to pay the money void. The part of the contract to which the Railway Company might have objected was that part which undertook to carry the road off of the direct line, it did not elect to avoid that part of the contract, but ratified it ; and it would not be administering law, but upholding dishonesty to permit the third party after receiving all the benefits of the contract to refuse to abide by it on the ground that it was a wrong upon a party who did not complain of it. There is no pretense of any actual fraud, no facts alleged from which it could be inferred.

Union P. R. R. Co. vs. Credit Mobilier, 135 Mass. 367.
Alexander v. Williams, 14 Mo., App. 13.
Kitchen v. St. L. R. &c. Co., 69 Mo. 224.
Ashurst's Appeal, 60 Pa., St. 291.
European &c., R. R. Co., v. Poor, 59 Me. 277.

The Court also sustained the demurrers to the plea of *non est factum.* We concede that the plea is in the form prescribed by the Code, and that the statute declares that any pleading conforming substantially to those forms is sufficient. The forms of declaration prescribed by the Code are for actions on written instruments, notes or bonds, wherein the only allegation is that defendant originally made or executed the instrument, the denial of the plea is that defendant or any one authorized by him did sign the particular paper sued on, it amounts to nothing more. If the complaint in this case had only alleged the original execution of the instrument, the plea might have been good, but the complaint goes further, it alleges clear and distinct acts of ratification that would make the contract the contract of the corporation, although the parties signing it had no authority whatever to do so. On the denial of the execution of a paper by a corporation, there are two distinct issues of fact. 1st. Did the parties who are alleged to have

signed the paper do so?- 2d. Were they authorized by the corporation to sign its name? Now here was a complaint alleging that Alfred Tyler and Samuel Noble, as President and Secretary of the defendant corporation had signed a certain paper and had caused its seal to be attached thereto, and also that it had been done by the authority of the corporation. But the complaint did not stop there, it went further and alleged a number of acts done under the instrument by the corporation, any one of which would have made the instrument binding upon it, even though in the first instance, it had been signed without its authority. When it comes to answer this complaint, defendant answers only a part of it. It does not deny that Tyler and Noble signed the paper. It does not deny the acts of ratification, but simply denies, that at the time, the parties did sign it, they were authorized to do so. The plea amounts to nothing more, the only allegation that that means anything in it is the one alleging that the agreement was not executed by any one authorized to bind the corporation; of course it could not execute any instrument unless it did so by some one authorized to bind it. Suppose the complaint had not alleged the acts of ratification and the plea had been filed, would not a replication setting up the act of ratification have been a good reply to the plea? We think clearly so, and if so, the facts being alleged in the complaint, a plea was not good which did not answer the whole complaint by denying those facts.

Smalley v. Anderson, 2 T. B. Mon. 56.
Logan v. Maulder, 1 Ark. 313.
Goodrich v. Reynolds, 31 Ill. 490.

But we submit that the plea is insufficient in such a case even had there been no allegations of acts of ratification. The statute does not say that a plea in such a form shall in all cases be sufficient; it merely furnishes a form and provides that it should be substantially followed. What is sufficient must depend upon the circumstances of each case.

As we said above there are issues arising on such a plea filed by a corporation that do not arise when it is interposed by an individual. Take this plea, for instance, what does it deny? Does it deny that Tyler and Noble signed the instrument, or that they were authorized by the corporation to do so? Which of these issues was defendant in error to meet? The plea gives no indication. Then we insist that such a plea is not sufficient in a suit on a written instrument alleged to have been executed by a corporation; it does not inform the opposite party what he must meet.

The plea should have been stricken from the file. The Alabama statute does not prescribe the form of the affidavit, therefore in determining its sufficiency we are governed by the principles of the common law. It should have shown that Noble—the affiant— was authorized by the corporation to make it, and also that the facts contained in it were true in substance and as matter of fact. With such an affidavit there would have been some reason for holding that the plea denied the acts of ratification alleged in the complaint, but there is none without it. Every fact in the plea may be true and yet the defendant be bound by the contract. It matters not how strong the proof might be of a subsequent ratification of the act of the officer, if they had no authority to sign the paper in the first instance there could be no conviction for perjury based upon it. This, to our minds, is conclusive of the insufficiency of the plea, as well as affidavit.

1 Archibald's *Nisi Prius, mar.* p. 108.
Ex parte Bank of Monroe, 7 Hill, 177.
Bangs v. McIntosh, 23 Barb. 601.
People v. Sutherland, 81 N. Y. 7.
Steinback v. Teen, 27 Cal. 299.
State v. Board of Com., 5 Nevada, 320.

The record shows that plaintiff in error reserved no exceptions to the rulings of the Court on the demurrers to

the first set of pleas, but asked for and obtained leave to file additional pleas. On the next hearing the demurrer to this plea of *non est factum* was heard with the demurrers to the other pleas. The judgment was upon each separately, but no exception was reserved to each separate ruling, but only one general exception to the ruling as a whole. This we submit is too general, if any of the pleas were insufficient.

H. C. TOMPKINS,
Attorney for Defendant in Error.

Supreme Court U.S.
FILED,
FEB 1 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1888.

WOODSTOCK IRON COMPANY,
Plaintiff in Error.
vs.
RICHMOND AND DANVILLE EXTENSION CO.,
Defendant in Error.
No. 180.

Additional Points and citations of authorities by H. C. Tompkins, Attorney for Defendant in Error.

Much confusion exists in the law books as to the meaning of the term *ultra vires*, growing out of its indiscriminate use by law writers and courts to denote several distinct classes of contracts. Contracts have been declared to be ultra vires:

1. When they transcend the powers conferred by law upon the entire corporation, acts which the stockholders even by unanimous consent cannot do or make valid.

2. When the thing contracted to be done cannot be done unless sanctioned by all the stockholders.

3. When the act contracted to be done is one which the executive part of the corporation is not authorized to do without the consent of the stockholders, and—

4. Acts are also said to be *ultra vires* when they cannot be done for the purpose for which they are contracted to be done, though they may be done for another purpose.

Green's Brice's Ultra Vires, 33-5.

Miners' Ditch Co. *vs.* Zellerbach, 37 Cal., 543, 578.

Contracts not falling within the first class cannot be said to be void under any circumstances. The most that can be said against them is that they are voidable at the election of the stockholders by an action seasonably commenced to restrain their performance. In Green's Brice's Ultra Vires, p. 35, it is said: "Now, it is manifest that any body of men, whether associated casually or by some stronger union, can bind themselves by positively participating and agreeing to any legal transaction. It is allowable to go a step further, and say, when this association takes the form of a corporation, the members can, by the concurrence of one and all in a given act, which, though not absolutely *ultra vires* of the corporation, is nevertheless not binding on it, render such act binding not merely on themselves, but on the corporation."

Public policy may forbid a corporation from obtaining a charter to engage in one character of business and then engaging in another business, but the money and property of a purely private corporation belongs to the shareholders after the payment of its debts, and it can and does offend no rule of public policy if the stockholders sell that property or give away that money. A majority, it is true, could not give it away without the consent of the minority, but the objection of the minority must be taken in the proper manner and at the proper time.

Bissell *vs.* Mich. S. & R. Co., 22 N. Y., 258, 268.
M. & P. Line *vs.* Wagener, 71 Ala., 581.

Such a contract as the one here entered cannot be said in any sense to be the exercise of a corporate power. It is a disposition of a portion of its property, but it is a disposition of it for no unlawful purpose; the building of railroads being in itself lawful, it was lawful for the plaintiff in error to give a part or even all of its property for that purpose—that is, it was lawful so far as the public was concerned. If it prejudiced the interest of the stockholders that was a matter be-

tween them and their officers who made the donation and with which the public had no concern. To call such an act void would be directly contrary to all principles of law and justice. The Code of Alabama, under which plaintiff in error was incorporated, declared, it is true, that corporations could not exercise any powers except those given by that Code and those necessary to the exercise of the power thus given, but that does not make acts void which may be done beyond the powers thus given.

2 Morawetz on Corporation, § 658.

But among the powers expressly given to corporations organized under the particular general law was "To make by-laws, not inconsistent with any existing law, for the transfer of its stock, the management of its property, or the regulation of its affairs." This authority is very broad. It expressly confers upon the corporation the power to do anything in the regulation and management of its business which i. not forbidden by "existing laws." Laws existing when? Why clearly when the act of regulation or management is performed. It was not the intention to tie corporations down to those acts which were not forbidden at the time the charter was obtained, but to permit them to regulate and manage their business as it was permissible for similar corporations to manage and regulate their business under the laws as they should exist at the time the regulation is adopted. This construction makes the law reasonable. There could be no reason for the Legislature wishing to deny to a corporation created under one general law the same powers it should afterwards determine could be safely entrusted to corporations created for the same purpose under a new general law.

Contracts are illegal and void at common law where they are, first, immoral, or, second, contrary to public policy. The first class is well-defined and clearly does not include contracts of the character here under consideration.

Contracts controvening public policy are divided into numerous classes. Among these classes are those in restraint of trade, those prejudicial to and clearly affecting the public revenues, those for or respecting the sale or transfer of public appointments, those preventing or impeding the course of public justice, and those agreeing to pay persons having imposed upon them a public duty in consideration of the discharge of that duty in a particular way. It is under this last-named class of contracts that it is sought to bring the contract under consideration. Those cases that give color to this position are all based upon the theory that the officers of a railroad in the location of its line have a public duty to discharge, and therefore cannot contract to receive a consideration to themselves for discharging that duty in a particular way. If this doctrine is sound, which is doubtful, as it is based upon the assumption that a railroad company in the location of its track should be controlled by the public interest and not private gain, it certainly has no application unless the consideration moves directly to the officer personally, unless there is some element of fraud in his accepting the remuneration. No indirect benefit to such officer can be sufficient.

It is clear from the authorities cited in the former brief for Defendant in Error that the decided weight of authority sustains the proposition that it is lawful to contract with a railroad company to pay it money or donate it land in consideration of its location by or through a particular place. If an indirect benefit to those making such a contract would vitiate it no such contract could be sustained in any case. A railroad company like all other corporations must act through and by its directors in making any contract and as they are always stockholders in the corporation of course they are indirectly benefited by such donations of money or land. Every director of a railroad company which makes such a contract is benefited thereby in the same manner that Johnston is

benefited by the contract involved in this suit, no more or less. Every director, who in behalf of his railroad company procures for it such a donation is benefited in the proportion that his stock bears to the entire stock. Here Johnston is benefited in the proportion that his stock in the railroad or construction company, whichever gets the benefit of the donation, bears to the entire stock of the company. It seems then to follow clearly that the fact that Johnston was a director in both companies cannot have any bearing upon the question under consideration. It does not bring the case within the rule declared by the authorities cited by counsel for plaintiff in error, because they are based upon the fact that the benefit accrued to the officer directly and individually, not to the company, except those cases which deny the power of the company itself to make such a contract. Then the case is reduced to this: A company has a contract to locate and build a railroad for B company. B company can lawfully make a contract to carry its line by a particular place in consideration of a donation of a sum of money to it. A company with its knowledge and consent, this is not denied and is therefore to be presumed, does make such a contract. Is that contract void? If so, upon what principle? What rule of public policy declares a contract which would be valid if made by the railroad company void if made by the construction company with its knowledge and consent, and at least partially for the benefit of the railroad company. It seems logically and clearly to follow that this defense was insufficient in law.

2 Chitty on Contracts, 982.
2 Addison on Contracts, 1135.
Railroad *vs.* Ralston, 41 Ohio St., 573.
Berryman; *vs.* Trustees, 15 Bush (Ky.), 755.
Stowell *vs.* Stowell, 45 Mich., 364.

The sworn plea only put in issue the authority of the officers signing the contract, which was under seal, to

originally execute the same. It cannot by any construction of the language used be held to be a denial of the acts of ratification averred in the complaint. Everything averred in the plea might have been true and yet the contract have been binding upon the plaintiff in error.

1 Chitty on Pleading, 511, 514.
McNeish *vs.* Stewart, 7 Cowen, 474.
Cooper *vs.* Watson, 10 Wend. 202.
2 Morawetz on Corporations, § 618.

Respectfully submitted
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Atty for Deft in Error